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No. 02-___

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IN THE

Supreme Court of the United States

HELEN MOORE, *et al.*
Petitioner,

v.

DETROIT SCHOOL REFORM BOARD, *et al.*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Michigan Public Act 10 of the Acts of 1999 violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, by changing the school board of the City of Detroit from an elected board to an appointed one where that change results in denying 60 percent of the black citizens of the State of Michigan the right to vote for school board while preserving that right for almost 100 percent of the white citizens of the State?

PARTIES TO THE PROCEEDING

The petitioners are Helen Moore, Agnes Aleobua, Stephen Conn, George Frazier, Mariatu Sesay, the Baptist Ministers' Conference, the Black Slate, Inc., the Coalition to Defend Affirmative Action by Any Means Necessary, the Community Coalition for Empowerment, Inc., the Eastside Ministers United in Action, the Keep the Vote—No Takeover Coalition, the Million Man Alumni Association, the Strike to Win Quality Education Caucus, United For Equality and Affirmative Action, and the Westside Ministers Alliance. The petitioners were plaintiffs in the district court and appellants in the Court of Appeals.

The respondents are the Detroit School Reform Board, Dr. David Adamany, former Chief Executive Officer of Detroit Public Schools, Dennis Archer, former Mayor of Detroit, and John Engler, the Governor of Michigan. The respondents were defendants in the district court and appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 293 F.3d 352 (6th Cir 2002) (App at 1a). The decision of the United States District Court for the Eastern District of Michigan is reported at 147 F. Supp. 2d 679 (ED Mich. 2000) (App at 41a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Voting Rights Act of 1965 provides as follows:

> 42 U.S.C § 1973. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. Section 5 of the Voting Rights Act of 1965 provides as follows:

> 42 U.S.C § 1973c. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to

voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the

Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or proce dure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

JURISDICTION

The Sixth Circuit denied rehearing and rehearing en banc on August 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT OF THE CASE

The plaintiffs are students, teachers and citizens of Detroit, as well as labor and community organizations based in Detroit, who brought this action against the School Reform Board, its Chief Executive Officer, the Mayor of Detroit and the Governor of the State of Michigan asserting that Michigan Public Act 10 of the Acts of 1999 (the Takeover Act) had unlawfully deprived the City of Detroit, comprising 60 percent of the black citizens of the State of Michigan, of the right to vote for school board while preserving that right for almost 100 percent of the white citizens of the State. As this Act converted an elected office into an appointed one in a way that resulted in discrimination against black citizens, the

plaintiffs asserted that it violated their rights under the Voting Rights Act of 1965, as definitively construed by this Court in *Allen v. State Bd of Elections*, 393 U.S. 544, 569-570 (1969).

The plaintiffs further asserted that the Takeover Act violated their rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States and their right under Article 4, Section 29 of Michigan's Constitution to vote by referendum on an act designed to apply to Detroit alone.

On cross motions for summary judgment, the district court dismissed the plaintiffs' case in its entirety, holding, inter alia, that the claims under the Voting Rights Act were foreclosed by a Sixth Circuit decision rendered shortly after the current case was filed upholding the conversion of Cleveland's elected school board into an appointed one and declaring that *Allen* was not applicable in areas where Section 5 of the Voting Rights Act did not apply (App at 63a-64a citing *Mixon v. State of Ohio*, 193 F. 3d 389 (6th Cir. 1999)).[1] The district court further held that the plaintiffs had failed to prove a claim under the Fourteenth and Fifteenth Amendments or under the Michigan Constitution (App at 53a-61a, 65a-70a).

The plaintiffs filed an appeal of right to the Sixth Circuit. The plaintiffs asserted that the district court's decision and the panel decision in *Mixon* directly contradicted not only *Allen*, but this Court's decisions holding that Sections 2 and 5 of the Voting Rights, with exceptions not here relevant, had to be construed as setting the same substantive standards.

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[1] The plaintiffs in *Mixon* did not seek review en banc or by certiorari because the Ohio Court of Appeals struck down the Mayoral takeover in Cleveland three weeks after the Sixth Circuit decision. That decision was then reversed by the Ohio Supreme Court in December 2000. See *Malcolm-Smith v. Goff*, 1999 WL 96145 (10/21/99), *rev'd on procedural grounds*, 99 Ohio St 3d 316, 738 NE 2d 793 (2000).

Chisom v. Roemer, 501 U.S. 380 (1991). The Sixth Circuit panel, however, held that it was bound by the prior panel's decision in *Mixon* and dismissed the Voting Rights claim (App at 18a-27a, 37a). It also affirmed the district court on all other counts (App 35a).

The plaintiffs petitioned for rehearing with a suggestion for rehearing en banc on their claims under the Voting Rights Act and under the Equal Protection clause. The Sixth Circuit denied rehearing and rehearing en banc on August 9 (App at 39a).

The plaintiffs have now petitioned this Court for a writ of certiorari on a claim of overriding national importance—whether the Voting Rights Act allows a state legislature to suspend the right of citizens in black-majority cities to vote for school board while preserving that right in every white-majority city, based on the Legislature's assertion that it had to suspend black parents' right to vote in order to improve the education of black children.

STATEMENT OF FACTS

From the passage of the Northwest Ordinance in 1787 until the passage of the Takeover Act, Michigan had system of public education democratically run by the electorate in each city, town and village. At first, Michigan's citizens controlled their schools directly, through annual school meetings. In 1838, Detroit became the first town to elect a school board, with the practice codified by special statute in 1869 and by general statute thereafter. At various dates, the Legislature enacted special and then general statutes establishing or codifying elected schools boards in all other villages, towns and cities in the State.[2]

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[2] *Belles v. Burr*, 76 Mich 1 (1889); Michigan Manual, 1999, Legis. Serv Bureau; Mich Loc Act 233, Acts of 1869; 1915 PA 15.

As 1999 began, every school board in Michigan was elected—and had been elected for a century or more. MCL 380.11a(7); 380.403a.[3] Each member of each board was subject to recall at any time. MCL 380.1105.

In 38 days, however, a newly-elected Legislature ended this two-hundred year old tradition by suspending for five years the right to elect a school board in one city—Detroit.[4] Under the Takeover Act, Detroit's schools would be run by a "Reform Board" consisting of six members appointed by the Mayor, with the seventh, the state superintendent of education, being appointed by the state board of education. 1999 PA 10, s 380.372; Const 1963, art 8, sec 3. Those seven members would choose by unanimous vote a Chief Executive Officer (CEO), who was to assume all powers of the previously elected board, subject only to veto by specific action of the newly-appointed Board. 1999 PA 10, s 380.372(2), (4); 374(1). In addition to control over the schools, the CEO was to assume control over the remaining $1.3 billion in proceeds from the bond fund that the citizens of Detroit had approved for the construction of new schools.

As was obvious, this Act would result in a very disproportionate disenfranchisement of Michigan's black citizens. Detroit is now over 80 percent black. After passage of the Takeover Act, virtually all of the State's white citizens

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[3] So far as can be determined, the only non-elected school boards in Michigan's history were the county intermediate boards, which provided assistance to local boards. Until 1970, these were appointed. MCL 380.611.

[4] By its terms, the Takeover Act applied to any district that had more than 100,000 students. MCL 380.402. As the Michigan Senate recognized, however, the Act would only ever apply to Detroit, since Grand Rapids, the next largest district in the State, had only 27,000 students (1999 Journal of the Senate 249, App at 118)

still voted for school board—while over 60 percent of the State's black citizens were denied that right. [5]

In imposing this law on Detroit, the Legislative majority repeatedly rejected amendments allowing Detroit's citizens to vote by referendum on the new Act before it went into effect. 1999 Journal of the Senate 242-243, 647. In the final vote, an overwhelmingly white, Republican, suburban and rural coalition overrode the "No" votes of the majority of Detroit's Senators and all of its Representatives. 1999 Journal of the Senate 245; 1999 Journal of the House 537. By its terms, the Act banned from appointment anyone whom Detroit's citizens had elected to the prior school board. 1999 PA 10, s 372(3); MCL 380.372(3). The Act even prevented Detroit's citizens from voting on the new law for five years after it was passed MCL 380.372(3); MCL 380.375. As this petition is being written, one major candidate for Governor and numerous outstate legislators have announced support for an extension of the takeover, still without a vote by Detroit's citizens.

The Legislature made no findings and issued no report stating its reasons for imposing this school board upon Detroit. In floor debates, however, the Act's chief sponsors claimed as their primary motivation a professed concern for the educational difficulties of Detroit's students, difficulties that they claimed were reflected in low test scores and high dropout rates (See, e.g., statement of Sen. DeGrow, 1999 Journal of the Senate, at 249, *see also* App. at 43a-44a).

The Takeover's supporters exaggerated the data and failed to acknowledge that Detroit's students outscored their counterparts from hundreds of other districts, including many where the students were overwhelmingly white and where the

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[5] According to the 1990 census., 777,916 of Michigan's 1,291,706 black residents lived in Detroit. Only four percent of its white residents lived in Detroit.

citizens have to this day have retained the right to vote.[6] Nevertheless, there was no question that the proponents' basic claim that Detroit's students scored less well on standardized tests than the state average and dropped out more often than the state average was true.[7]

The record was also undisputed, however, that those statistics reflected the racial and economic composition of the Detroit district. For many years, the Detroit district has been the most segregated large district in the nation, with over 90 percent of its students being black. Its percentage of students from poor economic backgrounds is double the statewide average; its parents are far less likely to have the educational background to assist their children when they run into academic difficulty; the City has fewer libraries and similar resources; its costs per student are far higher due to aging physical plant, aging equipment, increased security, a higher proportion of disabled students, and a host of other factors; and yet, with all its additional burdens, Detroit has to subsist on $7900 per student per year, while its more affluent neighbors receive up to $12,000 per student per year.[8] As the undisputed declarations of Professors Walter Haney and Richard Gibson established, the district's below-average test

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[6] Detroit's students outscored students from 146 other districts in grade 4 math; 240 other districts in grade 4 reading; 231 other districts in grade 8 science; 101 other districts in grade 8 science; 100 other districts in grade 8 writing; 76 other districts in grade 7 math; 81 other districts in grade 5 writing; and 43 other districts on all elementary tests (JA at 884-891)("JA" refers to the Joint Appendix filed in the Court of Appeals).

[7] According to a report issued by the new CEO of the Detroit district shortly after he was appointed by the takeover board, Detroit's students were graduating ". . . at two-thirds the rate of other Michigan students" and the scores of its eleventh graders were "over 27 percent behind the state average in reading and writing, over 41 percent behind in math, and 38 percent behind in science (JA, at 65).

[8] Michigan Department of Education, Michigan School Report, 1998-1999.

scores and above-average dropout rates are directly correlated with the poverty in and segregation of the district, which reinforce each other and coalesce to cause those scores and dropout rates (JA, at 728-733, 749-758).[9]

As a supplementary reason for the takeover, the sponsors asserted that the Detroit district suffered from a variety of administrative deficiencies, including problems with the bond, "mismanagement," "meddling," and one claimed scandal. The Detroit district had, however, ended the 1997-1998 fiscal year with a $93 million budget surplus, $1.3 billion in remaining bonding authority, and the prospect of increased revenues from casinos, stadiums and other downtown development (JA, at 792-793). Insofar as the supporters of the Takeover complained of mismanagement, they offered no reason for believing that Detroit's voters were less capable than other voters of remedying those problems by electing new officials. As for the scandal, the supporters

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[9] Professor Haney, who is one of the nation's leading experts on the use of standardized tests, prepared a study for this litigation, which was undisputed, showing that scores on the Michigan Educational Assessment Profile (MEAP) tests correlated directly with the income of the districts and that when that was taken into account, there was " . . . little indication that the achievement of students in Detroit schools [on the MEAP test] is dissimilar from achievement in Michigan schools generally" (JA, at 754-755, 758). Professor Gibson, then from Wayne State University, analyzed the deficiencies in the dropout data and asserted the well-established correlation between the economic level of a district's population and the dropout rate of its students. As he stated, without contradiction, students in poorer, urban districts graduate less frequently than students in more affluent areas "...due to a number of social factors, including economic need, the perceived lack of educational and employment opportunities in urban districts, and other factors largely beyond the control of the particular school authorities" (JA, at 730).

failed to note that it had occurred over twenty years ago and that its perpetrators had long since been voted out of office.[10]

By large majorities, Detroit's delegation opposed the Takeover, disputing the claim of educational reform by pointing out that the Takeover's supporters had rejected every amendment to provide more teachers, counselors and funds to address the educational problems of the district. 1999 Journal of the House 342-344, 354-355, 382, 394, 396, 530, 532, 534.

THE PROCEEDINGS BELOW

A. The district court.

In September 1999, the plaintiffs filed suit in the United States District Court asserting, inter alia, that the Takeover Act violated the Voting Rights Act of 1965, the Fifteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs named as defendants the School Reform Board, its Chief Executive Officer, the Mayor of Detroit, and the Governor of the State of Michigan.

The plaintiffs attempted to depose the main legislative proponents of the Takeover to determine what their true motives were. After the district court quashed those depositions on the grounds of legislative immunity, the parties filed cross motions for summary judgment. By an Opinion dated October 25, 2000, the district court denied the plaintiffs' motion and granted those filed by the defendants (App, at 41a).

On the Voting Rights claim, the district court held that it was bound by the Sixth Circuit's decision in *Mixon v. State of Ohio*, 193 F. 3d 389 (1999), which was rendered shortly after

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[10] The twenty-year old scandal involved members of the school board who had appropriated money to provide limousines and drivers for themselves (JA, at 693-694).

the plaintiffs filed the complaint in this case (App, at 63a). In that decision, which was to dominate almost all of the later proceedings in this case, the Sixth Circuit had held that Ohio could change from an elected to an appointed school board in Cleveland, without challenge under the Voting Rights Act, whatever the racial impact of that change might be. The *Mixon* panel had declared that this Court's repeated decisions holding that the Voting Rights Act prevented changes from elective to appointive systems that resulted in the unequal denial of voting rights to black citizens did not apply because those decisions were rendered under Section 5, not Section 2, of the Voting Rights Act. *Mixon, supra*, citing *Allen v. State Bd of Elections*, 393 U.S. 544, 569-570 (1969).

The district court rejected the plaintiffs' claim that *Mixon* was distinguishable because the Cleveland schools, unlike those in Detroit, were found to be in a state of administrative and fiscal collapse at the time of the takeover. It also rejected the plaintiffs' claim that *Mixon* was no longer binding on the district court after this Court had further defined the relationship between Sections 2 and 5 of the Voting Rights Act in *Reno v. Bossier Parrish School Board*, 528 U.S. 320 (2000)(*Bossier Parrish II*)(App, at 64a).

On the plaintiff's equal protection claim, the district court held that it was bound by *Mixon's* holding that denying the vote for school board to one city alone must be reviewed under the rational basis standard and found that the assertion that the change was made for educational reasons was sufficient to establish a rational basis for the takeover (App at 68a-70a).

B. The Sixth Circuit.

The plaintiffs filed a timely appeal to the Sixth Circuit. While recognizing that the panel that was assigned was bound by the prior panel's decision in *Mixon,* the plaintiffs preserved their position that the *Mixon* panel had erred in its

analysis of the Voting Rights Act. Before the panel, the plaintiffs further asserted that the Detroit takeover differed substantially from the one considered in *Mixon* and that the panel should reconsider *Mixon* in light of this Court's decision in *Bossier Parrish II*.

On June 12, 2002, the Sixth Circuit panel rendered a decision affirming the district court in all respects. In an opinion by Judges Gilman and Suhrheinrich and in a concurrence by Judge Merritt, the panel unanimously rejected the plaintiffs' claims under the Voting Rights Act on the grounds that it was bound by the opinion of the prior panel in *Mixon* (App at 18a-27a, 37a). The panel on this case declared that the factual differences between the takeover in Cleveland and that in Detroit were irrelevant, as was this Court's decision in *Bossier Parrish II*. Following *Mixon*, the two judges held that Section 5 and Section 2 of the Voting Rights Act should be interpreted differently, despite their virtually identical words. (App at 18a-27a, 37a).

Judges Gilman and Suhrheinrich further held that aside from *Mixon*, the plaintiffs could not prevail on their Voting Rights claim because they had no fundamental right to elect a school board in the first place, citing *Sailors v. Kent Bd of Educ*, 387 U.S. 105, 108 (1967)(App 22a-23a).

The Sixth Circuit held that there was no evidence of intentional racial discrimination and that the Takeovers' supporters' professions of concern for educational deficiencies were sufficient to state a rational basis for the statute's application to one city alone. The panel further found that the Act did not violate the Michigan Constitution (App at 30a-35a).

In a brief concurring opinion that focused exclusively on the state law and Voting Rights claim, Judge Merritt declared that the "law allows us no leeway to decide the case otherwise" and expressed the opinion that *Mixon* was "directly in

point and necessarily controls the outcome of this case under the Voting Rights Act" (App at 37a).

The plaintiffs filed a timely petition for rehearing with a suggestion for rehearing en banc, asserting that the Circuit should reconsider *Mixon* and hold that the Takeover Act violated Section 2 of the Voting Rights Act and the Equal Protection Clause. The Sixth Circuit denied rehearing and rehearing en banc on August 9, 2002 (App at 39a).

REASONS FOR GRANTING THE WRIT

By holding that black citizens may not challenge under the Voting Rights Act a statute that results in the suspension of the right to vote for school board for 60 percent of the State's black citizens, the Sixth Circuit's decision conflicts with decisions of this Court on an issue of surpassing national importance.

The Voting Rights Act was "designed to banish the blight of racial discrimination in voting" and to "assure that millions of non-white Americans will be able to participate for the first time on an equal basis in the government under which they live." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 337 (1966).

Thirty-five years after the passage of that historic Act, the Sixth Circuit has held that a majority of the Michigan Legislature could deprive 60 percent of the State's black citizens of the right to vote for school board without even being subject to challenge under the Voting Rights Act.

The statute approved by the Sixth Circuit followed a well-trod path. Immediately after Congress passed the Voting Rights Act, Mississippi changed the office of county superintendent of education from an elective to an appointed office in counties defined by various criteria that, without explicit reference to race, included the counties that had a black majority. In an historic decision, this Court held such

changes must be submitted to the Attorney General of the United States for prior approval under Section 5 of the Voting Rights Act because they "affected the power of the citizen's vote" in that "after the change he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen, supra*, 393 U.S. at 569-570.

In repeated decisions since, this Court has reaffirmed *Allen* as a central means to eliminate both subtle and obvious attempts to deny equal voting rights to black citizens:

> We held [in *Allen*] that [Section 5] applies also to . . . state decisions as to which offices shall be elective. [citation omitted]. We observed that 'the Voting Rights Act was aimed at the subtle, as well as the obvious., state regulations which have the effect of denying citizens their right to vote because of their race [citation omitted]. Our decision, and its rationale, have proved sound, and we adhere to both.

Presley v. Ettowah County Commission, 502 U.S. 491, 501 (1992).

The State of Michigan, now supported by the Sixth Circuit, claims the right to disregard *Allen, Presley*, and that rationale because the county where Detroit lies has never been subject to the provisions of Section 5. While Michigan concedes that it must eliminate discriminatory practices at the polls in school board elections, it claims the right to eliminate the polling place altogether for school board in the largest black-majority City in the nation, because, it says, the Act provides different standards and coverage in areas where Sections 2 and 5 of the Act apply than it does in areas where Section 2 applies by itself.

That argument, which is the central basis of the Sixth Circuit's decision, is directly contradicted by the fact that Congress chose virtually identical language for Section 5, which is not applicable to Detroit, and Section 2, which is applicable to Detroit. It also directly contradicts the policy,

reflected in that language, that there be one national standard for judging violations of the Voting Rights Act—a standard enforced by different procedures, but a single standard nonetheless. It finally contradicts the specific holdings of this Court—and the specific declarations by virtually every Justice—that the coverage and substantive standards of Sections 2 and 5 are, with exceptions not here relevant, identical.

In *Chisom v. Roemer*, 501 U.S. 380 (1991), this Court held that the citizens of Louisiana could maintain a challenge under Section 2 to the procedures used to elect judges because, in part, the Court had previously held that Section 5 applied to judicial elections and it was "highly unlikely" that Congress intended that the coverage of the two sections be different:

> If Section 2 did not apply to judicial elections, a State covered by Section 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under Section 2. It is highly unlikely that Congress intended such an anomalous. result.

Chisom, supra, 501 U.S. at 401.

While this is at the very least an alternative basis for this Court's holding in *Chisom*, the Sixth Circuit on two occasions cursorily dismissed an Opinion signed by seven Justices as dicta (App at 24a; *Mixon, supra*, 193 F. 3d at 407).[11]

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[11] In *Chisom*, this Court held that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed . . ." *Id*, at 401. As is apparent, the Court held that Louisiana could change its statewide system to an appointive one without running afoul of the Voting Rights Act; there is, however, not the slightest suggestion that the Court was abandoning *Allen* to allow Louisiana to do so in black majority areas alone.

The Sixth Circuit also ignored repeated statements from the Justices of this Court that Sections 2 and 5 had the same coverage and established the same substantive standards. For example, it ignored Justice O'Connor's declaration that "I do not think it is possible to read the terms of Section 2 more narrowly than the terms of Section 5." *Holder v. Hall*, 512 U.S. 874, 886 (1994)(O'Connor, J, concurring in part and dissenting in part). Similarly, it ignored the view expressed by Justices Breyer, O'Connor and Souter, citing the House Report on the 1982 amendments, that ". . . the substantive standards for Section 2 and 5 violations are the same, so long as the challenged practice represents a change from 1965 conditions . . ." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 209 n 25 (1996).

Indeed, the panel ignored the fact that even those Justices who are inclined to a narrower construction of the Voting Rights Act have declared that the language of "Sections 2 and 5 would appear to be designed to work in tandem" and that, if anything, Section 2 has a "broader sweep" than Section 5. *Morse, supra*, 517 U.S. at 281(Thomas, Rehnquist, Scalia, JJ, dissenting). See also *Bossier Parrish II, supra* (Section 5 covers only retrogressive changes, while Section 2 covers changes with discriminatory purposes or results).

As its asserted grounds for departing from the policy that there is one national, substantive standard—and for departing from the statute and the decisions that have established that policy—the Sixth Circuit held that the history of blatant racial discrimination in the South and the other areas covered by Section 5 justified "interpreting the two sections differently" (App at 25a; see also *Mixon, supra*, 193 F 3d at 407-408). Apart from *Bossier Parrish II*–which holds that Section 2 has, in most cases, a *broader* sweep than Section 5–the Sixth Circuit cited no decision from this Court *or from any court* that ~~it even~~ claimed supported this central basis for its opinions (App at 25a). In fact, the Circuit *could* cite no such

decisions, because this Court and the other circuits have repeatedly declared that the coverage and standards set by Sections 2 and 5 are the same. See, for example, *League of Latin American Citizens v. Clements*, 914 F 2d 620, 644-645 (CA 5 1990)(scope of Section 2 and 5 identical) (Higginbotham, J, concurring), *rev'd on other grounds sub nom Houston Lawyers' Assoc v. Attorney General of Texas*, 501 U.S. 419 (1991); *Smith v. Salt River Project*, 109 F 3d 586 (CA 9 1997)("It therefore seems logical that § 2 should reach *at least as far as § 5*")(emphasis added).[12]

Under the Sixth Circuit's misconstruction of the Voting Rights Act, in place of one national standard enforced by different procedures in different areas, there are now different standards for different states subject to Section 5 and those that are not subject to Section 5. In many states, including Michigan, that have counties that are covered and others that are not covered by Section 5, there are now different standards in the different areas of the same state. In fact, under the Sixth Circuit's decisions, there are even different standards in the states and counties that are covered by Section 5, depending upon whether the voter invokes Section 5 or Section 2 to challenge the claimed violation.

The panel majority's alternative holding only deepens the quagmire into which the Circuit has gone. According to the panel, the plaintiffs have no Section 2 claim because they did not have "the right to do something (elect school board members) that they never had a fundamental right to do."

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[12] Without support from *any* case holding that a *change* from an elective to an appointive office could escape scrutiny under the Voting Rights Act, the Sixth Circuit was forced to rely on irrelevant cases holding that the Act did not require states to convert long-established appointive systems into elective ones. *See, e.g., Irby v. Virginia State Board of Elections*, 889 F 2d 1352, 1358 (CA 4 1989); *African-American Citizens for Change v. State Louis Bd of Police Comm'r*, 24 F 3d 1052, 1053 (CA 8 1994) and other cases cited by *Mixon*, 193 F 3d at 407.

(App at 22a-23a, citing *Sailors, supra*, 387 U.S. at 109. In *Chisom*, however, this Court *squarely* rejected that assertion by holding that while Louisiana did not have to provide for the election of its judges, if it chose to do so, it had to hold those elections in compliance with the Voting Rights Act. *Chisom, supra*, 501 U.S. at 401-402.

The Sixth Circuit's departure from the clear words and definitive interpretations of one of the most important statutes enacted in the last century would by itself present a question of major importance to the nation. But the violation is not simply one of defying the words of the statute and of the Court. As a result of the Sixth Circuit's decisions, black citizens in two of the nation's largest cities have now been subjected to a discriminatory denial of the right to vote in an area precious. to any citizen—the right to control the education of his or her children. That result cannot but undermine the legitimacy of the school boards–and of the laws that sanction such a result.

While both *Mixon* and *Moore* are dangerous decisions, the panel's decision in this case poses a special threat to the Voting Rights Act. Michigan's Legislature denied the vote to Detroit not because of some temporary administrative or fiscal crisis, but because of test scores and dropout rates that are indisputably correlated with and caused by the racial and economic composition of the Detroit district. If allowed to stand, the takeover in Detroit means that virtually any black or Latino majority district in the country can be denied the right to vote virtually at will. Indeed, this Court has already considered, and dismissed on ripeness grounds, an action testing the application of the Voting Rights Act to a Texas statute authorizing the appointment of masters to oversee elected local school boards if the students' test scores and graduation rates did not meet particular standards. *Texas v. United States*, 523 U.S. 296 (1998).

Whatever one's views of high-stakes testing, denying the right to vote to black and Latino parents because of their children's test scores is not a result that can possibly be sanctioned under the Voting Rights Act.

Nor is the issue presented in this case confined to education alone. If the right to vote for school board can be denied because of statistical indices tied to race and poverty, the right to vote for prosecutors and judges can also be denied because there is almost always more identified crime in less privileged areas. Indeed, for any office where voting is not required by the Constitution, votes could be suspended in black, Latino and other minority areas because of indices linked to poverty and segregation.

In reaching the result that it did, the Sixth Circuit was undoubtedly concerned with the real or perceived educational deficiencies in the Detroit district. But so are the parents and citizens of Detroit. As reflected in the votes of their representatives, in their continued resistance to the takeover, and in the continued refusal of the Legislature to allow Detroit to vote on the takeover, Detroit's citizens do not believe that suspending their right to vote has improved or will improve the education of their children.[13]

But the crucial question under the Voting Rights Act is *not* the motive of the overwhelmingly white legislative majority that voted to deny the franchise to a black-majority City. After years of bitter experience, Congress declared that "proof of intent is no longer required" and by statute applicable to all areas of the country outlawed practices that *result* in the denial of equal voting and political rights to black citizens. *Chisom, supra*, 501 U.S. at 394, citing 42 USC 1973.

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[13] Indeed, as the supporters of the takeover have themselves announced, three years after the takeover, the students' test scores have gone down, not up.

In place of the Act's results standard, applied nationally, the Sixth Circuit has reinstituted a standard of intent in judging takeovers in those vast regions of the country that are not subject to Section 5. In place of the Act's declared policy of eliminating both blatant and subtle forms of discrimination, *Allen, supra*, the Sixth Circuit has substituted a policy under which voters can only challenge practices and statutes that are so blatant that the plaintiffs can overcome almost insurmountable hurdles and prove that the Legislature harbored a racially discriminatory intent.

CONCLUSION

For a right so precious, a statute so important, and a result so pernicious to the nation, the Sixth Circuit's defiance of this Court's holdings and of the statute upon which they are based should not be allowed to stand. The petitioners request that the Court grant their petition for certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 00-2334

HELEN MOORE, *et al.*,
Plaintiffs-Appellants,

v.

DETROIT SCHOOL REFORM BOARD;
David Adamany; Dennis W. Archer, Mayor of the
City of Detroit, and John Engler,
Governor of the State of Michigan,
Defendants-Appellees.

Argued May 3, 2002.
Decided and Filed June 12, 2002.

Before: MERRITT, SUHRHEINRICH, and GILMAN, *Circuit Judges*.

OPINION

GILMAN, *Circuit Judge*.

Five citizens of Detroit and ten organizations representing students, teachers, and other residents of the city brought this lawsuit to challenge the validity of the Michigan School Reform Act (MSRA). They sued the Detroit School Reform Board (Reform Board), David Adamany, the former chief executive officer of the Detroit Public School System (DPS), Dennis Archer, the mayor of Detroit, and John Engler, the governor of Michigan. The MSRA created an appointed

school board to govern the DPS and eliminated the authority of its elected school board. According to the plaintiffs, the MSRA violates (1) the Michigan Constitution's requirements for local legislation, (2) § 2 of the Voting Rights Act, and (3) the Fourteenth and Fifteenth Amendments to the United States Constitution and similar provisions of the Michigan Constitution. The district court granted summary judgment in favor of the defendants. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

In March of 1999, the Michigan legislature enacted the MSRA. This legislation amended Michigan's Revised School Code (School Code) by providing for the appointment of a seven-member school reform board in qualifying school districts. Mich. Comp. Laws § 380.372. Any "first class school district," defined as a district with more than 100,000 students, is a qualifying school district and thus subject to the MSRA's provisions. *Id.* §§ 380.371(c), 380.402. Only the DPS, which had approximately 180,000 enrolled students when the MSRA was enacted, currently meets this prerequisite. Grand Rapids, with about 27,000 students at the time the MSRA was passed, has the next largest school district in Michigan.

The MSRA requires the mayor of any city in which a qualifying school district is located to appoint six of the seven members of the school reform board. *Id.* § 380.372(2). Either the state superintendent of public instruction or that officer's designee serves as the seventh member of the board for the first five years of its operation. After the initial five-year period, the mayor appoints the seventh member. *Id.* With the exception of the initial state superintendent, the mayor has the authority to remove board members for any reason. *Id.* § 380.372(4).

Any person who is serving as an elected member of the school board when the transition from the elected to the appointive system occurs is not eligible to become a member of that district's school reform board. *Id.* § 380.372(3). Although the MSRA suspends the duties and authority of the elected school board, its members may continue to meet and serve in an advisory role until their terms of office expire. *Id.* § 380.373(1). But they are not entitled to compensation or reimbursement for any work that they do. *Id.*

The MSRA requires a school reform board to choose a chief executive officer (CEO). *Id.* § 380.374. Although the CEO serves at the will of the reform board, he or she has all of the authority and assumes all of the duties that the School Code confers upon elected school boards. *Id.* §§ 380.373(4), 380.374. The state superintendent of public instruction or that person's designee has the ability to veto the school reform board's choice of a CEO. *Id.* § 380.374(1). Five years after the appointment of a school reform board, the citizens of a qualifying school district are able to vote to determine whether to retain the reform board, the CEO, and the structure established by the MSRA. *Id.* § 380.375.

Prior to the enactment of the MSRA, the elected Detroit Board of Education (Detroit school board) requested that New Detroit, Inc., which is a coalition of community, business, labor, education, and religious leaders, conduct an independent and impartial review of the DPS. New Detroit convened a panel (Review Panel) consisting of a representative group of community leaders to prepare its report, which it submitted to the Detroit school board in July of 1997. The Review Panel recommended "a complete and fundamental restructuring of the school system's management and internal operations." In addition, the report recognized the need for immediate action, noting that "the DPS must launch its restructuring without delay and continue the hard work consistently for years to come. Failure to take decisive

action now will further erode the system's credibility and, eventually, cost it the community's faith and backing."

The Detroit school board adopted the report two weeks later and appointed a seven-member team to implement the Review Panel's recommendations. An assessment of the DPS's progress toward achieving these initial goals was presented by the Review Panel the following year. After acknowledging that progress had been made in reaching several of the original objectives, the Review Panel expressed its view that "[t]he structure of DPS and the nature of the restructuring challenges, however, have significantly slowed the pace of action on many of the major objectives."

During the Michigan legislative debates over the MSRA, several amendments were offered that would have allowed Detroit's citizens to vote by referendum on whether to approve the legislation. None of these amendments were adopted. The Michigan Senate approved the MSRA by a vote of 30 to 7, with 3 of the 7 opposing votes coming from Detroit's 5 senators. In the Michigan House of Representatives, the vote was 66 to 43 in favor of the MSRA, with all of Detroit's representatives opposing it.

Senator Daniel DeGrow, the chief sponsor of the MSRA, explained why he supported the act in a speech on the Senate floor. In particular, he believed that because the DPS had 180,000 students, its deficiencies affect the entire state of Michigan. He explained that the MSRA was designed to effect a "fundamental change" that would provide the students in the DPS with "the opportunity to achieve a quality education." According to Senator DeGrow, the elected school board's refusal to take crucial actions had effectively denied Detroit's students any meaningful educational opportunity.

Many of the other state senators echoed these sentiments. The most common reasons for their decisions to support the

MSRA were the low graduation rates in the DPS--only 30 percent of the entering class proceeded to graduation--and the failure of Detroit students to obtain satisfactory scores on the standardized Michigan Educational Assessment Profile (MEAP). Several senators also faulted the elected school board for failing to use the proceeds of a $1.5 billion bond program for needed improvements to the DPS. In addition, they identified extravagant expenditures made by the elected board members that included the use of chauffeured limousines and extensive foreign travel.

The Reform Board selected Dr. David Adamany to be its CEO in May of 1999. Dr. Adamany served as CEO until June 30, 2000. The Reform Board then appointed Dr. Kenneth Burnley to replace Dr. Adamany, with Dr. Burnley's term beginning on July 1, 2000.

By amendments that became effective in June of 2000, the Michigan Legislature altered the language of several provisions in the MSRA. These amendments added more general, open-ended terms to replace language that might have been interpreted to preclude other school districts from becoming subject to the MSRA's provisions as their student enrollments increase. In the amended version of the MSRA, the Legislature specified that the changes were added "to reaffirm the legislature's initial intent to apply [the MSRA] . . . to any school district that was a qualifying school district . . . at the time of enactment of [the MSRA] or that may hereafter become a qualifying school district." 2000 Mich. Pub. Acts No. 230.

B. Procedural background

The plaintiffs filed this lawsuit in the United States District Court for the Eastern District of Michigan in September of 1999. An amended seven-count complaint was filed five months later. The first two counts allege that the MSRA violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and a similar

provision in the Michigan Constitution by denying Detroit's citizens the right to vote for their city's school board and by prohibiting Detroit's elected school board members from being appointed to the Reform Board. Count III alleges that the MSRA deprives Detroit's citizens of the right to vote on the basis of their race, in violation of Section 2 of the Voting Rights Act of 1965. The fourth count contends that the MSRA violates the Fourteenth and Fifteenth Amendments to the United States Constitution and the Equal Protection Clause of the Michigan Constitution because it was allegedly enacted with the intent of denying Detroit's citizens the right to vote on account of their race. Count V challenges the MSRA on the ground that it conflicts with Article 4, Section 29 of the Michigan Constitution (Article 4) because it was a local act that was not approved by both a two-thirds vote of the Michigan Legislature and a majority vote of Detroit's citizens. The sixth count alleges that the MSRA deprived Detroit's citizens of their right to elect a school board in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and a similar provision in the Michigan Constitution. Finally, the plaintiffs contend in Count VII that the defendants violated the First Amendment to the United States Constitution by, among other things, penalizing Detroit's voters for opposing the plans of Governor Engler and Mayor Archer.

The plaintiffs presented the affidavits and deposition testimony of various individuals in support of their claims. They offered, for example, the deposition testimony of William Aldridge, the former chief financial officer of the school system, in an attempt to show that the MSRA failed to address the financial problems confronting the DPS. Aldridge stated that the DPS required higher expenditures than other school districts because of the costs associated with providing security, transportation, free or reduced lunch programs, and mental health professionals, and that its students faced unique challenges.

The plaintiffs also attempted to discredit the purported justifications for enacting the MSRA--including Detroit's high dropout rate and low test scores--through the affidavit of Dr. Richard Gibson, who was an Assistant Professor of Education at Wayne State University when the MSRA was passed. According to Dr. Gibson, the high dropout rates of the DPS are misleading because they treat students who move to other school districts as dropouts. This practice, in Dr. Gibson's view, artificially inflates the dropout rates between poor urban school districts like Detroit and more affluent school systems, because students in the former tend to move more frequently than do those in the latter. Dr. Gibson acknowledged, however, that national research has shown that poor urban school districts, especially those with large minority-student populations, have above-average dropout rates. Because social factors such as economic need and the perceived lack of educational and employment opportunities in the urban districts contribute to these dropout rates, Dr. Gibson expressed his belief that urban school districts should not necessarily be blamed for elevated dropout rates.

Both Dr. Gibson and Dr. Walter Haney, a Professor of Education at Boston College, discussed the strong correlation between the MEAP scores and the socio-economic status of the population within each school district. Dr. Haney performed a statistical analysis comparing the MEAP scores of various school districts in Michigan. He concluded that the extreme poverty of many residents in Detroit's school district accounted for the lower MEAP scores of its students. Similarly, Dr. Gibson expressed his opinion that additional resources would be necessary to improve the MEAP scores of Detroit's students.

The plaintiffs also introduced evidence to counter the perception that the DPS faced a financial crisis. Specifically, they pointed out that the district had a $93 million budget surplus at the end of the 1997-1998 fiscal year. Although the

plaintiffs recognized that the state had refused to authorize the use of the proceeds of a $1.5 billion school bond program because of disputes with the elected school board, they pointed out that the chauffeured limousine scandal had occurred 20 years before and that the board members who had been involved in this incident were voted out of office. The elected school board members who had spent money on foreign travel and other excessive items were similarly voted out of office.

In August of 2000, CEO Adamany, Mayor Archer, and the Reform Board filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Governor Engler followed suit with a separate motion for summary judgment that was filed two days later. Later that month, the plaintiffs filed their own motion for partial summary judgment.

After conducting a hearing on the parties' motions, the district court granted summary judgment in favor of the defendants in October of 2000. The court concluded that the MSRA (1) was not subject to the requirements of Article 4, because it was not local legislation, (2) did not violate § 2 of the Voting Rights Act, because § 2 applies only to elective systems, (3) survived the plaintiffs' equal protection challenges, because it was rationally related to the purpose of improving Detroit's schools and did not infringe upon any fundamental rights or constitute racially motivated legislation, and (4) was not prohibited by the Fifteenth Amendment, because the plaintiffs failed to establish that a discriminatory purpose motivated the enactment of the legislation. In addition, the court dismissed the plaintiffs' First Amendment claims for lack of standing and because the plaintiffs possessed no fundamental right to elect the school board members or to retain elected officials. This timely appeal challenges all aspects of the district court's order other than

its dismissal of the plaintiffs' First Amendment claims, which claims are no longer being pursued.

II. ANALYSIS

A. Standard of review

A district court's grant of summary judgment is reviewed de novo. *Holloway v. Brush,* 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering such a motion, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Local-act claim

The plaintiffs' first argument is that the MSRA violates the Michigan Constitution because it was enacted without satisfying the constitutional requirements for local legislation. Article 4 prohibits the Legislature from enacting any "local or special act in any case where a general act can be made applicable." Mich. Const. art. 4, § 29. When the Legislature passes a local act, Article 4 requires that it be "approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected." *Id.* The defendants argue that this provision does not apply to the MSRA because the Michigan Constitution specifically addresses the issue of education and gives the Legislature the ultimate authority to regulate public schools. They further contend that, in any event, the MSRA is not a local act. The district court agreed with the

defendants' second argument, concluding that because the MSRA is an act of general application, Article 4 did not require a two-thirds majority vote in the state Legislature or referendum approval by the citizens of Detroit.

To support their position that Article 4 does not apply to matters of public education, the defendants rely upon the principle that where legislation deals with a subject matter of statewide concern, the act is not a "local or special act," even though its effects might be limited to a particular geographic location. In *Hart v. County of Wayne*, 396 Mich. 259, 240 N.W.2d 697 (1976), the Michigan Supreme Court held that legislation requiring Wayne County to supplement the salaries of Recorder's Court judges serving within the county was not subject to the local-act provision of Michigan's Constitution. *Id.* at 703-04. The court explained that because the Recorder's Court is "a state court performing a state function, not a local function," the legislation at issue was not a local act. *Id.* at 703. In addition, the court held that the specific provisions in Michigan's Constitution governing the state-court system prevailed over the general subject of local acts. *Id.* at 703-04 & n. 7.

The defendants seek to apply *Hart's* principles to the present case, noting that Michigan's Constitution provides that "[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Mich. Const. art. 8, § 2; *see MacQueen v. City Comm'n of Port Huron*, 194 Mich. 328, 160 N.W. 627, 629 (Mich.1916) ("Fundamentally, provision for and control of our public school system is a State matter, delegated to and lodged in the State legislature by the Constitution in a separate article entirely distinct from that relating to local government."). But the defendants' position requires them to distinguish *Common Council of the City of Detroit v. Engel*, 202 Mich. 536, 168 N.W. 462 (1918), where the court held that legislation limiting the permissible interest rate on school

bonds for the Detroit public schools violated the local-act requirement. *Id.* at 464-65. The *Engel* court recognized that the state Constitution vested the Legislature with primary authority over all educational matters, but it nevertheless concluded that "all powers of the legislature, whatever they may be, are, under and by virtue of the Constitution, subject to general constitutional mandates and limitations imposed on legislation without reservation." *Id.* at 464.

According to the defendants, *Hart* effectively overruled *Engel*, or at least undermined the reasoning upon which *Engel* was based. The problem with this argument, however, is that *Hart* discussed *Engel* without overruling it. Instead, the court noted that "*Engel* is not the sole authority on exempting a general subject of legislation from the local act referendum requirement where the challenged statute pertains to a particular location." *Hart*, 240 N.W.2d at 701 (recognizing that the Michigan Supreme Court had previously held that an act dealing with the construction and operation of a bridge located at a particular site, and acts concerning matters of health, did not implicate the local-act provision because the statutes in such cases relate to matters affecting the entire state). The court also distinguished the facts of *Engel* from the statute it was examining by concluding: "More importantly, funding of the judiciary is a unique situation presenting overriding state concerns. *Engel* does not apply in the instant case." *Id.*

Given that *Engel* has not been overruled, and that both the present case and *Engel* involve the state Legislature's control over educational matters, *Engel* is potentially applicable to the present case. The defendants' contention that *Hart* effectively overruled *Engel* is an argument that the Michigan Supreme Court might one day see fit to address. But we have no authority to do so in light of the fact that *Hart* distinguished rather than rejected *Engel*, thus leaving *Engel* as good law. *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys. Inc.*,

249 F.3d 450, 454 (6th Cir.2001) (recognizing that federal courts in diversity cases "apply state law in accordance with the controlling decisions of the state supreme court"); *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir.1999) ("A federal court exercising supplemental jurisdiction over state law claims is bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction.").

Because legislation that deals with public education is not automatically exempt from Article 4, we must determine whether the MSRA is a local act. Neither side disputes that the MSRA affects only the DPS at the present time. The MSRA, however, does not mention Detroit by name, but rather defines a "qualifying school district" in terms of the number of enrolled students.

As an initial matter, the parties disagree about whether we should focus on the original or the amended version of the MSRA. Unlike the original act, which contained several provisions that could be construed to limit the MSRA's applicability to Detroit, the amended version clarifies that if future districts reach the requisite size, they too will be subject to the MSRA. This difference is crucial, because where a statute includes a population classification and contains provisions indicating that it will have no application to localities that reach the specified population in the future, the statute must comply with the local-act requirement. *Mulloy v. Wayne County Bd. of Supervisors*, 246 Mich. 632, 225 N.W. 615, 616-17 (1929) (holding that because the statute's provisions prevented it from having a prospective application to counties that reached the required population, "[n]o other conclusion can be reached than that it is local legislation applicable to Wayne county only"); *but see City of Dearborn v. Wayne County Bd. of Supervisors*, 275 Mich. 151, 266 N.W. 304, 305 (1936) (noting that legislation is *not* local if the statute applies whenever the specified population

is reached and if a reasonable relationship exists between the population classifications and the subject matter).

The plaintiffs contend that the amendments to the MSRA, which were made after this lawsuit was filed, are post-litigation efforts to mask the MSRA's true intent to limit its application to Detroit. As such, they argue that the original version of the MSRA reveals the legislative intent. Both the Michigan courts and this court, however, have recognized that amendments are often intended to clarify the original intent of legislation, rather than to remove aspects of a statute that would render it invalid. *Petition of Detroit Edison Co.*, 350 Mich. 606, 87 N.W.2d 126, 130 (1957) (noting that "if uncertainty exists as to the meaning of a statute," an amendment might be "adopted for the purpose of making plain what the legislative intent had been all along from the time of the statute's original enactment"); *United States v. Tapert*, 625 F.2d 111, 121 (6th Cir.1980) ("An amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid. It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws."). We will therefore concentrate on the amended version of the MSRA to determine whether its population classification renders it subject to Article 4's requirements.

The Michigan Supreme Court has squarely held that where a particular act applies only to cities or counties with a specified population, that statute is not a local act if a reasonable relationship exists between the population classification and the purpose and subject matter of the legislation. *Irishman's Lot, Inc. v. Cleary*, 338 Mich. 662, 62 N.W.2d 668, 670-71 (1954) (holding that a statute prohibiting the purchase and sale of automobiles on Sundays in counties with more than 130,000 people was not a local act because a reasonable relationship existed between the restriction and the population); *Mulloy v. Wayne County Bd. of Supervisors*, 246

Mich. 632, 225 N.W. 615, 616 (1929) ("If it is a reasonable and logical basis of classification, considering the subject of legislation, unquestioningly a specified population may be made the test of the applicability of a general legislative act; and under such conditions the act will not be construed to be invalid as local legislation.").

The absence of a reasonable relationship between the population classification and the subject matter of the legislation, however, renders the statute a local act that must satisfy the requirements of Article 4. *Avis Rent a Car Sys., Inc. v. Romulus Cmty. Schs.*, 400 Mich. 337, 254 N.W.2d 555, 559-60 (1977) (holding that legislation allowing the government to impose taxes on concessions at airports located in counties of more than 1,000,000 inhabitants was a local act, because "[w]e do not see a reasonable relationship between the withdrawing of a tax exemption from airport concessions and the size of the county where the airport is located").

Applying these principles to the present case, we conclude that a reasonable relationship exists between the size of a school district and the perceived shortcomings that led the Michigan Legislature to enact the MSRA. The Legislature's determination that first-class school districts present unique problems because of their size, and that an appointed school board would be better equipped to address those challenges than would an elected board, is not unreasonable. *Irishman's Lot, Inc.*, 62 N.W.2d at 671 ("When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed or to other legitimate proof, that the action is arbitrary.") (quoting *Borden's Farm Prods.*

Co., Inc., v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187, 79 L.Ed. 281 (1934)).

In *Lucas v. Board of County Road Commissioners*, 131 Mich.App. 642, 348 N.W.2d 660 (1984), the Michigan Court of Appeals held that a statute permitting the chief executive officer of a county with more than 1,500,000 residents to remove incumbent road commissioners and fill the vacancies was not a local act. *Lucas*, 348 N.W.2d at 666. The court explained that "[b]ecause densely populated counties such as Wayne County present problems of governmental management and control different in kind, quality, and magnitude from those faced by other counties, [the challenged act] is not unconstitutional as local legislation." *Id.* Although *Lucas* involved road commissioners rather than school-board members, the rationale of *Lucas* is fully applicable to the present case.

The dividing line between school districts with student populations that are so large that they might reasonably necessitate the transition from an elective to an appointed school board and those districts where an elected school board can effectively address the school system's needs is undoubtedly somewhat fluid. But the absence of a clear dividing line does not render the Legislature's decision arbitrary, because "[o]nce the validity of a population factor is recognized, the Legislature's choice as to where to draw the line, unless patently arbitrary, must be upheld." *Id.* In addition, the MSRA defines a "qualifying school district" as "a school district of the first class," and the School Code provides that school districts with at least 100,000 enrolled students are first-class school districts. Mich. Comp. Laws §§ 380.371, 380.402. This designation of first-class school districts predated the enactment of the MSRA, with an even higher 120,000 student enrollment required for classification as a first-class school district in the past. The Michigan Legislature thus recognized the unique problems and

challenges that a district of that size presents even before enacting the MSRA, and treated these districts differently.

Regardless of the relationship between the size of a school district and the asserted need for appointed rather than elected school boards, the plaintiffs insist that the MSRA is invalid because the Legislature enacted it solely to address the perceived shortcomings of the DPS. According to the plaintiffs, the defendants cannot maintain that the MSRA is a law of general application while simultaneously justifying it as necessary to address the problems of Detroit's schools. This argument, however, fails to recognize that even though the circumstances in a particular city or county might lead the Legislature to enact a statute, the resulting legislation can nevertheless be general if it contains population classifications that are reasonably related to the subject matter at issue. Indeed, Detroit's problems may be indicative of the unique challenges that all large urban school districts confront, thus suggesting that Detroit serves as only the current example of the reason to treat first-class school districts differently.

The plaintiffs also rely upon the Michigan Supreme Court's decision in *Attorney General ex rel. Dingeman v. Lacy*, 180 Mich. 329, 146 N.W. 871 (1914), where the court explained that the state Legislature could not mask its intent to enact local legislation simply by using population classifications rather than naming a particular county:

> [A] classification by population can never be sustained where it is, as in the case at bar, a manifest subterfuge. The act under consideration might with equal propriety have been limited in its operation by its title to the county of Wayne. Its "general" character is not established by the use of other words which mean the same thing.

Lacy, 146 N.W. at 875. But reliance upon this language is misplaced in light of several subsequent Michigan Supreme

Court decisions. In *Sullivan v. Graham*, 336 Mich. 65, 57 N.W.2d 447, 449 (1953), for example, the court explained that "we have to a material degree departed from the reasoning in . . . [*Lacy*] in respect to restrictions in statutes of applicability to counties of a designated total of population." Furthermore, although the MSRA applies only to Detroit at the present time, it contains language of general applicability. The fact that other school districts might never become first-class school districts does not render the MSRA a local act. *City of Dearborn v. Bd. of Supervisors*, 275 Mich. 151, 266 N.W. 304, 306 (1936) ("The probability or improbability of other counties or cities reaching the statutory standard of population is not the test of a general law.").

As their final argument on this local-act issue, the plaintiffs contend that the defendants have failed to demonstrate that any reasonable relationship exists between the size of a school district and the need for an appointed rather than an elected school board. This contention challenges the basis for the Michigan Legislature's belief that an appointed school board would be able to address the problems of the DPS—and of large school districts in general—more effectively than an elected school board. The record reveals several reasons, however, that support a finding that a reasonable relationship exists. Prior to enacting the MSRA, for example, the Review Panel suggested that fundamental changes needed to be made at the DPS, and the one-year evaluation of the DPS's progress in achieving the panel's recommendations noted that the structure of the DPS had prevented progress from occurring in certain areas. These reports support a conclusion that changes in the DPS's governing structure, such as an appointed rather than an elected school board, were needed.

Although the Review Panel focused exclusively on the DPS, a study prepared by the Michigan House Legislative Analysis Section discussed the arguments favoring and opposing the MSRA in more general terms. In particular, the

analysis noted that the MSRA was modeled in part after the Chicago School District's reform efforts, which consisted of replacing an elected school board with an appointed board. Chicago's public schools achieved "higher scores on standardized tests, better attendance, higher graduation rates, and lower dropout rates" following the transition to an appointed school board. The Review Panel's recommendations and the success that Chicago experienced after reforming its school system support the reasonableness of the Michigan Legislature's determination that an appointed school board would be beneficial in large school districts.

For all of the preceding reasons, we conclude that the MSRA is not a local act, and was therefore not required to be enacted pursuant to the provisions set forth in Article 4. Accordingly, the MSRA does not violate that portion of the Michigan Constitution, and the district court did not err in granting summary judgment to the defendants on the plaintiffs' local-act challenge.

C. Voting Rights Act claim

The plaintiffs' second contention is that the MSRA conflicts with § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . ." 42 U.S.C. § 1973(a). According to the plaintiffs, the MSRA violates § 2 because it denies Detroit's voters the right to elect their school board, while allowing other Michigan citizens to continue to vote for their school board members.

Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need show only that the challenged

action or requirement has a discriminatory effect on members of a protected group:

> A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b); *see Mixon v. Ohio,* 193 F.3d 389, 407 (6th Cir.1999) ("Although Plaintiffs must prove discriminatory intent to prevail in an Equal Protection Clause or Fifteenth Amendment claim, Section 2 of the Voting Rights Act requires only a showing of discriminatory effect.").

In *Mixon,* this court held that § 2 applies only to elective systems, not to appointive offices. *Mixon,* 193 F.3d at 407-08. The plaintiffs in *Mixon* challenged an Ohio statute that changed the process for selecting Cleveland School Board members from an elective to an appointive system, legislation that had precisely the same effect as does the MSRA in the present case. *Mixon* relied upon dicta in *Chisom v. Roemer,* 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991), to reach its conclusion that § 2 does not apply to appointive offices. *Mixon,* 193 F.3d at 407. The Supreme Court in *Chisom* held that state judicial elections are subject to the provisions of § 2, but noted that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion." *Chisom,* 501 U.S. at 401, 404, 111 S.Ct. 2354.

As the plaintiffs recognize, "a prior published opinion of this court is binding unless either an intervening decision of the United States Supreme Court requires modification of the prior opinion or it is overruled by this court sitting en banc." *United States v. Roper*, 266 F.3d 526, 530 (6th Cir.2001). The plaintiffs argue, however, that the Supreme Court's decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier Parish II*), undermines *Mixon's* reasoning. They also contend that *Mixon* is factually distinguishable from, and thus not directly applicable to, the present case. We will address both of these arguments below.

1. Bossier Parish II's *impact on* Mixon

Bossier Parish II dealt with § 5 of the Voting Rights Act. Section 5, which applies only to specified jurisdictions with a history of discriminatory voting practices, requires preclearance of any changes that a covered political subdivision makes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. Preclearance is available from either the Attorney General of the United States or the United States District Court for the District of Columbia, but only if the covered jurisdiction "demonstrate[s] that the proposed change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" *Bossier Parish II*, 528 U.S. at 328, 120 S.Ct. 866 (quoting 42 U.S.C. § 1973c).

In *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), the Supreme Court held that a discriminatory "effect" for the purpose of § 5 exists only if the change is "retrogressive." *Id.* at 141, 96 S.Ct. 1357 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."). The

Court in *Bossier Parish II* adhered to *Beer*, holding that "§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Bossier Parish II*, 528 U.S. at 341, 120 S.Ct. 866.

This holding was based upon the Court's conclusion that § 5's preclearance requirements are not identical to § 2's prohibition against voting practices with a discriminatory effect. *Id.* at 333-34, 120 S.Ct. 866. Clarifying the meaning of § 5 preclearance, the Court noted that in the vote-dilution context,

> [preclearance] does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive that what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.

Id. at 335, 120 S.Ct. 866.

The plaintiffs argue that the Court's recognition in *Bossier Parish II* that § 2 is broader than § 5 in the context of vote-dilution cases casts doubt upon the reasoning in *Mixon*, because plaintiffs who live in jurisdictions subject to § 5's preclearance requirements can bring § 2 but not § 5 challenges to changes in voting systems that have an alleged discriminatory effect, even though no retrogression exists. In particular, the plaintiffs focus on *Mixon's* comment that "[t]he fact that Section 5 is limited to certain jurisdictions implies that Congress intended to allow other jurisdictions to change from an elective to an appointive system without facing challenges under the Voting Rights Act." *Mixon*, 193 F.3d at 408. According to the plaintiffs, this reasoning is no longer valid after *Bossier Parish II*. They note that the Supreme Court has recognized that changes from elective to appointive systems are subject to § 5. *Presley v. Etowah*

County Comm'n, 502 U.S. 491, 503, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992) (holding that "§ 5 applies to changes . . . affecting the creation or abolition of an elective office"); *Allen v. State Bd. of Elections,* 393 U.S. 544, 569-70, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (concluding that a shift from an elected to an appointive office is covered by § 5). Although § 5 does not apply to the state of Michigan, the plaintiffs read *Presley* and *Allen* in conjunction with the language in *Bossier Parish II* to support their contention that *Mixon* must be overruled.

The plaintiffs' argument, in our opinion, is without merit. In the first place, *Bossier Parish II* did not involve appointive systems. Nor did it address the complete denial of the right to vote that the plaintiffs claim is implemented by the MSRA. *Bossier Parish II,* 528 U.S. at 338 n. 6, 120 S.Ct. 866 (explaining that "our holding today does not extend to violations consisting of an outright 'denial' of an individual's right to vote, as opposed to an 'abridgment' as in dilution cases"). The fact that a plaintiff who brings a vote-dilution claim can succeed under § 2 by demonstrating a discriminatory effect, even though a § 5 action would fail because of the lack of retrogression, is simply not relevant to whether § 2 applies to appointed offices in political subdivisions not subject to § 5.

For these reasons, *Bossier Parish II* is not applicable to the present case, and *Mixon* remains the binding precedent of this court. *Mixon's* rejection of a Voting Rights Act claim that is indistinguishable from the plaintiffs' allegations, in a factual context that is nearly identical to the present case, therefore controls the outcome of the plaintiffs' § 2 challenge to the MSRA.

Moreover, aside from the fact that *Mixon* rejected a claim that § 2 applies to a shift from an elective to an appointive system of selecting school board members, several additional problems exist with the plaintiffs' argument under § 2. Most

importantly, citizens do not have a fundamental right to elect nonlegislative, administrative officers such as school board members. *Sailors v. Kent Bd. of Educ.*, 387 U.S. 105, 108, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967) (holding that voters did not have a right to elect the members of the county school board, who were chosen by delegates from the local school boards, noting that "[w]e find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election"); *Mixon,* 193 F.3d at 403 ("Although plaintiffs have a fundamental right to vote in elections before them, there is no fundamental right to elect an administrative body such as a school board, even if other cities in the state may do so."). The comparison that the plaintiffs seek to make between their ability to elect school board members before the MSRA was enacted and their inability to do so under the MSRA thus involves circular reasoning. Specifically, they appear to complain about lacking the right to do something (elect school board members) that they never had a fundamental right to do. *See Sailors,* 387 U.S. at 109, 87 S.Ct. 1549 ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.").

In this respect, the rationale of *Bossier Parish II* actually counters the plaintiffs' argument, because the Supreme Court noted that in § 2 challenges alleging the abridgment of the right to vote, a comparison must be made between the status quo and a hypothetical alternative: "If the *status quo* 'results in [an] abridgment of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote *ought to be,* the status quo itself must be changed." *Bossier Parish II,* 528 U.S. at 334, 120 S.Ct. 866 (emphasis and brackets in original). The plaintiffs complain about the status quo imposed by the MSRA, but they have no authority for their implied conclusion that they *ought to have* the right to elect

members of the Detroit school board. *Sailors* clearly negates the existence of any such right.

The inability to bring a Voting Rights Act claim based upon the existence of an appointive system where an elected system would be preferable to the residents of the affected political subdivision also undermines the plaintiffs' reliance upon *Chisom's* dicta that draws parallels between §§ 2 and 5. Specifically, after commenting on "[t]he close connection between §§ 2 and 5" that the similar language in both sections establishes, and recognizing that § 5 applies to judicial elections, the Supreme Court stated:

> If § 2 did not apply to judicial elections, a State covered by § 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under § 2. It is unlikely that Congress intended such an anomalous result.

Chisom, 501 U.S. at 401-02, 111 S.Ct. 2354. The problem with applying this reasoning to the plaintiffs' contention that § 2 should apply to changes from elective to appointive systems is that, even in political subdivisions that must comply with § 5, appointive systems of office are permissible. Section 5 thus becomes an issue only if a school district subject to § 5 attempts to transition from an elected system to an appointive system.

The plaintiffs argue, however, that because §§ 2 and 5 contain similar language, § 2 *ipso facto* also covers such transitions. We disagree with this reasoning. Section 5 applies only in "areas where voting discrimination has been most flagrant," whereas § 2 prohibits "voting discrimination in any area of the country where it may occur." *South Carolina v. Katzenbach,* 383 U.S. 301, 315-16, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). The Supreme Court upheld the

constitutionality of § 5 in *Katzenbach,* noting that even though the burden of gaining preclearance "may have been an uncommon exercise of congressional power, . . exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334-35, 86 S.Ct. 803. Specifically, § 5 was designed to respond to the use of "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 335, 86 S.Ct. 803.

The justifications for the more onerous requirements of § 5 support interpreting the two sections differently. *Bossier Parish II* recognized this principle and identified a situation in which a plaintiff might prevail under § 2, even though preclearance would be available to the local jurisdiction under § 5. As noted above, however, *Bossier Parish II* did not involve a situation with parallels to the present case. Requiring transitions from elected to appointed systems to be preapproved under § 5, while declining to permit such changes to be subject to challenge under § 2, does not conflict with either the holding or the dicta in *Bossier Parish II.*

2. Mixon's *applicability to the present case*

Several of the groups that filed *amicus* briefs supporting the plaintiffs argue that *Mixon* is distinguishable from the present case. The ACLU, for example, contends that, unlike *Mixon,* the MSRA established "a hybrid elective-appointive system--unique to Michigan--with the elected school board serving an advisory role to the newly created appointed reform board." Other *amici* maintain that *Mixon* is not applicable because it involved a situation where a federal district court had transferred control of the affected school district from an elected school board to the state superintendent of schools. We find neither of these arguments to have merit.

The MSRA allows the elected members of the Detroit school board to serve in a voluntary, advisory capacity until

their terms of office expire. But they have no authority to act, and nothing compels the Reform Board to heed their advice. Moreover, all of their duties have been transferred to the Reform Board, and the elected board members are not entitled to any compensation or reimbursement for any counseling that they might provide. Finally, the MSRA does not contain any provision that would replace the elected board members as their terms of office expire. The plaintiffs are simply mistaken in arguing that this purely voluntary, advisory role, which the elected board members can either implement or not, constitutes a hybrid elective-appointive system.

With respect to the plaintiffs' attempt to distinguish *Mixon*, they correctly recognize that the Cleveland School District was operating under a federal consent decree when the Ohio Legislature enacted the challenged legislation. The federal district court had ordered the state board of education and the state superintendent of public instruction to "assume immediate supervision and operational, fiscal, and personnel management of the District" on March 3, 1995. *Mixon*, 193 F.3d at 395 (citation omitted). More than three years later, "the district court ordered the State Superintendent to return control of the Cleveland schools to the City of Cleveland as of September 9, 1998." *Id.* The Ohio Legislature passed the statute that established "municipal school districts" on July 22, 1997. *Id.* As this court explained in *Mixon*,

> [t]he legislation defines a municipal school district as "a school district that is or has ever been under a federal court order requiring supervision and operational, fiscal, and personnel management of the district by the state superintendent of public instruction." Upon the statute's enactment, the Cleveland School District fell within the statute's definition and became a municipal school district.

Id. (internal citations omitted).

The plaintiffs seek to attach significance to the fact that the Cleveland School District was under a federal court order immediately before the Ohio legislation at issue in *Mixon* was enacted. They fail to acknowledge, however, that the Cleveland School District would have returned to an elected system of governance if the Ohio Legislature had not passed the "municipal school district" statute. As a result, the history that preceded Cleveland's transition from an elected school board to one appointed by the mayor is a distinction without a difference in evaluating the legal parallels between *Mixon* and the present case.

The plaintiffs also contend that Ohio's municipal school-governance legislation is materially different from the MSRA, because the Cleveland mayor was authorized to appoint all of the nine school board members, whereas the MSRA allows the state superintendent of public instruction or that officer's designee to be a member of the school reform board. This distinction, however, does not alter the nature of the plaintiffs' Voting Rights Act challenge, nor does it legally differentiate the present case from *Mixon*.

For all of the reasons discussed above, we conclude that the plaintiffs have failed to state a claim under § 2 of the Voting Rights Act. As a result, the district court did not err in granting summary judgment to the defendants on this claim.

D. Fourteenth and Fifteenth Amendment claims

The plaintiffs' final challenge to the MSRA involves a variety of claims brought under the Fourteenth and Fifteenth Amendments to the United States Constitution and similar provisions of the Michigan Constitution. They first contend that the MSRA constitutes racially discriminatory legislation in violation of the Fourteenth Amendment, the Fifteenth Amendment, and the Michigan Constitution. Their second claim is that the MSRA violates the Equal Protection Clauses of the Fourteenth Amendment and the Michigan Constitution

because it prevents the residents of Detroit from voting for their school board members, and because it prohibits former school board members from serving on the Reform Board. Although the plaintiffs' complaint also included a due process challenge to the MSRA, they have not pursued this claim on appeal.

Under the Equal Protection Clause of the Fourteenth Amendment, courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) (explaining that under the Equal Protection Clause of the Fourteenth Amendment, "[c]lassifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting scrutiny") (internal citations omitted). This level of review demands that the statute be "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Laws that do not involve suspect classifications and do not implicate fundamental rights or liberty interests, in contrast, will be upheld if they are "rationally related to a legitimate state interest." *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir.2000). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *see Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 484 (6th Cir.1999) ("On rational-basis review, a classification bears a strong presumption of validity and 'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'") (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

The Equal Protection Clause of the Michigan Constitution requires the same differential tiers of scrutiny for evaluating legislation. *Doe v. Dept. of Social Services,* 439 Mich. 650, 487 N.W.2d 166, 170-71, 174 (1992) (explaining that Michigan's Equal Protection Clause requires strict scrutiny for legislation involving racial classifications or fundamental rights, but that rational-basis review applies where no suspect classification or fundamental right is involved).

Turning first to the plaintiffs' racial discrimination claim, the MSRA does not contain any explicit racial classification. Where facially neutral legislation is challenged on the grounds that it discriminates on the basis of race, the enactment will be required to withstand strict scrutiny only if the plaintiff can prove that it "was motivated by a racial purpose or object," or "is unexplainable on grounds other than race." *Hunt v. Cromartie,* 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (internal quotation marks and citations omitted) (setting forth the standards for Fourteenth Amendment Equal Protection Clause challenges); *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (*Bossier Parish I*) (recognizing that both the Fourteenth and Fifteenth Amendments require a plaintiff "to establish that the State or political subdivision has acted with a discriminatory purpose"). Proving that a law has a racially disparate impact, without more, is therefore insufficient to establish a violation of either the Fourteenth or the Fifteenth Amendment. *Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (concluding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

In *Village of Arlington Heights,* the Supreme Court identified five factors that are relevant for determining whether facially neutral state action was motivated by a racially discriminatory purpose: (1) the impact of the official

action on particular racial groups, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that preceded the state action, (4) procedural or substantive departures from the government's normal procedural process, and (5) the legislative or administrative history. *Id.* at 266-68, 97 S.Ct. 555.

Neither side disputes that the MSRA has a substantial impact on African-American citizens. Specifically, Detroit's population is nearly 80 percent African-American, and about 60 percent of Michigan's African-American residents live in Detroit. The DPS has an even higher percentage of African-Americans, with over 90 percent of its student population belonging to this minority group. As noted above, however, this disparate impact alone is insufficient to establish invidious racial discrimination.

The plaintiffs insist that, in addition to this evidence of disproportionate impact, the legislative process surrounding the enactment of the MSRA supports a finding of intentional discrimination. In particular, they complain about the Legislature's (1) speedy passage of the MSRA, (2) disrespectful treatment of Detroit's elected senators and representatives, (3) failure to gather and analyze relevant information before voting on the MSRA, (4) refusal to hold hearings in Detroit, (5) rejection of amendments that would have used a standard other than school-district population to define qualifying school districts, (6) selection of reform measures that allegedly fail to address the real problems with the DPS, and (7) reliance on a scandal that occurred many years before to justify its actions.

These complaints, rather than constituting evidence of a discriminatory motive, indicate a general dissatisfaction with the legislative process that preceded the enactment of the MSRA. Allegations that the Legislature acted with haste and did not engage in extensive fact-finding might be a legitimate

and even a valid critique of its behavior, but it does not lead to an inference of racial discrimination. Similarly, the Legislature's rejection of amendments and choice of methods to address the perceived problems of the DPS is simply the operation of the democratic process. Although the plaintiffs object to the outcome, they offer neither direct nor circumstantial evidence that would support a finding of impermissible motives. They do not, for example, present any comparisons to show that the Legislature's actions and procedures with respect to the enactment of the MSRA differed in any manner, let alone in a material way, from its handling of other legislation. Nor do they present any historical background that would suggest a desire to discriminate against African-Americans.

Moreover, nothing in the legislative history indicates that any of the state senators or representatives had the goal of preventing African-Americans from being able to elect the members of their local school boards. As the defendants note, the MSRA does not deprive voters living in four other predominantly African-American school districts in Michigan of the right to elect their school board members. This fact suggests that the Michigan legislators sought to address a problem that they perceived to exist in school districts with large populations, not that they wanted to disenfranchise African-Americans. *See Hearne v. Bd. of Educ. of City of Chicago,* 185 F.3d 770, 776 (7th Cir.1999) (rejecting the Equal Protection Clause challenge brought by teachers and other tenured employees of the Chicago Board of Education who were terminated under procedures established by state statutes that applied solely to Chicago, noting that "[t]here are substantial numbers of African-Americans in many other cities in the state, and it is simply too great a stretch to say that the population represented by the Chicago school system is such a good proxy for African-Americans that the

ostensibly neutral classification is an obvious pretext for racial discrimination.") (internal quotation marks and citation omitted).

We thus conclude that the plaintiffs have failed to establish that an impermissible discriminatory purpose motivated the Legislature to enact the MSRA. As a result, the plaintiffs have failed to state a claim under the Fifteenth Amendment. Moreover, because the MSRA does not infringe upon any fundamental right, our conclusion that the MSRA does not constitute racially discriminatory legislation eliminates the necessity of applying strict scrutiny to the plaintiffs' Equal Protection Clause challenge under the Fourteenth Amendment.

The second basis for the plaintiffs' challenge under the Equal Protection Clause is their contention that the MSRA is not rationally related to any legitimate government interest. Although the plaintiffs originally argued that the MSRA had to withstand strict scrutiny because it allegedly infringed on their fundamental right to elect members of the Detroit school board, they do not pursue this contention on appeal. (The plaintiffs recognize that *Mixon* refutes their contention that the Detroit school board is a legislative body that Detroit's citizens have a fundamental right to elect, but they insist that they will pursue this argument if this court considers the matter en banc or if the Supreme Court grants certiorari.) They continue to insist, however, that the MSRA fails to survive rational-basis review because (1) it was enacted on the basis of "anecdotes collected from newspapers" rather than any specific factual findings or relevant studies, and (2) it effectively transferred complete control of the DPS to the state, because the state superintendent, who is not accountable to Detroit citizens, has veto power over the reform board's decisions.

Before evaluating the plaintiffs' equal protection challenge under the rational-basis test, we note the contention raised by

several of the *amicus curiae* that the MSRA infringes upon the fundamental right of Detroit parents to direct the education of their children. The plaintiffs did not raise this argument in the district court, nor does it appear in their original or amended complaint. "This court does not normally address issues raised for the first time on appeal." *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1072 (6th Cir.1993). Although the rule is discretionary, this court "has adhered to the rule except in exceptional cases or particular circumstances or when the rule would produce a plain miscarriage of justice." *Id.* (internal quotation marks and citations omitted). We see no reason to depart from the general rule in the present case. As a result, we decline to address the belated argument that the MSRA infringes upon the fundamental right of Detroit parents to direct the education of their children.

The plaintiffs present a considerable amount of evidence to refute the reasons given by the state senators and representatives for enacting the MSRA. Specifically, Dr. Gibson and Dr. Haney both expressed their beliefs that the lower MEAP test scores among Detroit students reflected their socio-economic status, not flaws in the school system. Dr. Gibson also explained why the dropout rates for the DPS likely overstated the problem. Former Chief Financial Officer Aldridge discussed the extra expenditures that the DPS had to make to address its unique circumstances, and he noted the budget surplus at the end of fiscal year 1997-1998. The plaintiffs also counter the accusations of various incidents of extravagant spending by noting that the scandals had occurred many years ago and resulted in the elected board members who spent excessively being voted out of office.

Despite these challenges, we conclude that the MSRA is rationally related to a legitimate government interest. The Michigan Legislature was entitled to believe that the MSRA

would address the problems that the legislators perceived to exist in the DPS. Indeed, the very size of the Detroit school district as compared to other districts--180,000 students versus 27,000 students for the next largest system--provides a rational basis for adopting a different approach to governance. *Hearne,* 185 F.3d at 774-75 ("With respect to public schools, it was entirely rational for the legislature to believe that the logistics of running a school system designed to serve 431,085 students (the number of students enrolled in Chicago's public schools for the 1997-98 school year) were far different from those implicated in systems serving less than a tenth of that number."). Although the plaintiffs would have preferred the Legislature to consider studies that established correlations between socio-economic factors and problems such as low test scores and high dropout rates, its alleged failure to do so does not render the MSRA unconstitutional. The plaintiffs' arguments might demonstrate that the MSRA would not meet the narrow-tailoring requirement of strict scrutiny, but the rational-basis standard does not require detailed factual findings in support of challenged legislation. *FCC v. Beach Communications,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (explaining that under the rational basis standard, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

Many of the state senators who supported the MSRA indicated that they perceived a crisis in the DPS and believed that a need for immediate action existed. They recognized that the MSRA was an experiment of sorts, but felt compelled to take the risk of the unknown rather than continue with a system that appeared to be failing. The Equal Protection Clause does not prohibit such experimentation where no suspect classification or fundamental right is involved. *Mixon,* 193 F.3d at 403 ("State legislatures need the freedom to experiment with different techniques to advance public

education and this need to experiment alone satisfies the rational basis test."); *Hearne*, 185 F.3d at 775 ("The crisis [the Illinois Legislature] perceived in Chicago also was a legitimate reason to take immediate action there, leaving open the possibility of extending similar measures to other places.").

For the preceding reasons, we conclude that the plaintiffs have failed to state a claim for violations of either the Fourteenth or the Fifteenth Amendment to the United States Constitution, or of the Equal Protection Clause of the Michigan Constitution. The district court therefore did not err in granting summary judgment to the defendants on these claims.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

MERRITT, *Circuit Judge*, concurring.

I agree with the result reached by the Court. But the length and elaborateness of the Court's opinion, to some extent, disguises rather than reveals the clarity of the law we must follow. The law offers us no leeway here to decide the case otherwise.

On the Michigan home rule issue, we must follow state law. Michigan law is clear that the state legislature may change the composition and governance of the Detroit school board by statute. And we have already decided the Voting Rights Act issues raised here in our recent case upholding Ohio's same statute changing the Cleveland school board.

The home rule provision of the Michigan Constitution of 1963, Article 7, § 22, states that each municipality has the power to adopt a city charter and to adopt "ordinances related to its municipal concerns, property and government, subject to the Constitution and law." The education article of the Michigan Constitution, Article 8, then provides in § 2 that "the legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." The legislative branch provisions in Article 4 state at § 29 that the legislature "shall pass no local or special act in any case where a general act can be made applicable" unless "approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected." These provisions come from the earlier Michigan Constitution of 1908.

Under Michigan law we have no alternative but to uphold the validity of the Michigan legislation now before us. The case of *Burton v. Lindsay,* 184 Mich. 250, 151 N.W. 48 (1915), is directly in point. In *Burton v. Lindsay,* the Michigan Supreme Court held that legislation, Act No. 251, Public Acts of 1913, applicable only to the school system in the City of Detroit, was valid. The act in question in *Burton v.*

Lindsay, like the legislation now before us, was designed to change the composition of the school board in Detroit. The opinion in *Burton v. Lindsay* states that the act's "expressed purpose is that, in districts co-extensive with a city having a population of 250,000 or more [Detroit only] the board of education shall consist of seven members elected at large...." 184 Mich. at 255-56, 151 N.W. 48. By such legislation, the Michigan Legislature altered Detroit's board of education. The Court said that there was no need for "a referendum to determine whether it shall or shall not be effective ... because the act is not local in character." 184 Mich. at 256, 151 N.W. 48. The Supreme Court of Michigan has not overruled the case on this point, nor did the Constitutional Convention of 1963, or a later legislature. *Burton v. Lindsay* answers the state-law home rule issue now before us.

I agree with the Court that *Mixon v. Ohio,* 193 F.3d 389 (6th Cir.1999), is directly in point and necessarily controls the outcome of this case under the Voting Rights Act. For these reasons, I would affirm the judgment of the District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Jun. 12, 2002]

No. 00-2334

HELEN MOORE, *et al.*,
Plaintiffs-Appellants,

v.

DETROIT SCHOOL REFORM BOARD; DAVID ADAMANY; DENNIS W. ARCHER, Mayor of the City of Detroit, and JOHN ENGLER, Governor of the State of Michigan,
Defendants-Appellees.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

Before: MERRITT, SUHRHEINRICH, and GILMAN, *Circuit Judges*.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard GREEN
LEONARD GREEN, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Aug. 9, 2002]

HELEN MOORE, *et al.*,
Plaintiffs-Appellants,

v.

DETROIT SCHOOL REFORM BOARD, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: MERRITT, SUHRHEINRICH, and GILMAN, *Circuit Judges*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 19, 2002]

No: 00-2334

HELEN MOORE; AGNES ALEOBUS; STEPHEN CONN; GEORGE FRAZIER; MARIATU SESAY; BAPTIST MINISTERS CONFERENCE; BLACK SLATE, INC.; COMMUNITY COALITION FOR EMPOWERMENT; EASTSIDE MINISTERS UNITED IN ACTION; MILLION MAN ALUMNI ASSOCIATION; KEEP THE VOTE NO TAKEOVER COALITION; STRIKE TO WIN QUALITY EDUCATION CAUCUS; UNITED FOR EQUALITY AND AFFIRMATIVE ACTION; WESTSIDE MINISTERS' ALLIANCE; COALITION TO DEFEND AFFIRMATIVE ACTION;

Plaintiffs-Appellants,

v.

DETROIT SCHOOL REFORM BOARD; DAVID ADAMANY; DENNIS W. ARCHER; JOHN ENGLER,

Defendants-Appellees.

MANDATE

Pursuant to the court's disposition that was filed 6/12/02 the mandate for this case hereby issues today.

COST: NONE

Filing Fee . . . . . $
Printing . . . . . .$
Total . . . . . .$

A True Copy.

Attest:

/s/ [Illegible]
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
E.D. MICHIGAN
SOUTHERN DIVISION

[Filed Oct. 25, 2000]

No. 99-74438

HELEN MOORE, *et al.*,
Plaintiffs,

v.

SCHOOL REFORM BOARD OF THE CITY OF DETROIT, *et al.*,
Defendants.

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; GRANTING DEFENDANTS ADAMANY'S, SCHOOL REFORM BOARD'S, AND ARCHER'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING DEFENDANT GOVERNOR ENGLER'S MOTION FOR SUMMARY JUDGMENT

EDMUNDS, *District Judge*.

This matter came before the Court at a hearing on October 3, 2000, on 1) Plaintiffs' Motion for Partial Summary Judgment; 2) Defendants Adamany's, School Reform Board's, and Archer's Motion for Summary Judgment; and 3) Defendant Governor Engler's Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion for Partial Summary Judgment is DENIED, and Defendants' Motions for Summary Judgment are GRANTED.

I. Facts

Plaintiffs filed this suit challenging the validity of the Michigan School Reform Act, 1999 Public Acts 10 and 23, which brought about the suspension of the old Detroit Public School Board and the creation of a new Detroit Public School Reform Board.

Plaintiffs include the following residents of the City of Detroit: Helen Moore, Agnes Aleobua, Stephen Conn, George Frazier, and Mariatu Sesay. Plaintiffs also include the following incorporated and unincorporated associations of Detroit residents: The Baptist Ministers' Conference; The Black Slate, Inc.; The Coalition to Defend Affirmative Action by Any Means Necessary; The Community Coalition for Empowerment, Inc.; The Eastside Ministers United in Action; The Keep the Vote—No Takeover Coalition; The Million Man Alumni Association; The Strike to Win Quality Education Caucus; United For Equality and Affirmative Action; and The Westside Ministers Alliance. Plaintiffs filed this suit on September 13, 1999, challenging the School Reform Act against the following Defendants: The School Reform Board, established by 1999 Public Act 10; Dr. David Adamany, former Chief Executive Officer of Detroit Public Schools;[1] Dennis Archer, Mayor of Detroit; John Engler, Governor of Michigan.

The School Reform Act, effective March 26, 1999, amended the Revised School Code, Mich.Comp.Laws Ann. § 380.1 *et seq.*, to establish school reform boards for qualifying school districts. Mich.Comp.Laws Ann. § 380.371-.471a. A "qualifying school district" was defined as a school district with a pupil population of 100,000 or more. *Id.* § 380.402. The Act provided that the mayor of any "qualifying school district" must appoint six of seven mem-

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[1] The School Reform Board has now appointed a new CEO, Dr. Kenneth Burnley.

bers of the school board within thirty days. *Id.* § 380.372(1) & (2). While a majority of the board must be composed of school electors of the qualifying school district (*i.e.* Detroit residents), others who are non residents may be appointed to the board as well. *Id.* § 380.372(3). The seventh member of the reform board is the Superintendent of Public Instruction, selected by the State Board of Education, or his designee. *Id.* The Act suspended the powers and duties of the existing school board, *id.* § 380.373(1), and disqualified the existing school board members from appointment to the new School Reform Board. *Id.* § 380.372(3).

Public Act 10 provided that the new School Reform Board would appoint, by unanimous vote, a Chief Executive Officer for the district. *Id.* § 374. However, effective May 12, 1999, Public Act 23 amended § 374, by providing that the Reform Board appoint a CEO by a 2/3 majority, instead of by a unanimous vote. The Superintendent of Public Instruction maintained a veto power over the vote to appoint the CEO. The Chief Executive Officer was empowered to exercise all of the powers and duties previously vested in the elected school board. Five years after the initial appointment of the Reform Board, the question of whether to retain the Reform Board and the CEO and whether to retain the authority of the mayor to appoint the board under the Act shall be placed on the ballot. *Id.* § 380.375.

The only school district in Michigan that currently falls under the statute's definition of a "qualifying school district" is the City of Detroit. The Legislature was aware that the Act would affect the Detroit Public Schools. Senator Dan DeGrow, who sponsored the bill, explained that the Act's purpose was to improve the education for a large number of Michigan students.

> There are approximately 180,000 students in the Detroit Public Schools. To put it in perspective, the next largest school district is Grand Rapids, which has around

27,000 students. . . . . I hope that gives you the idea of the magnitude of what happens when children aren't provided the educational opportunity they deserve and how that has repercussions throughout the state, just because of the magnitude.

It has been said by someone else that Detroit is not the worst school district in the state and I won't dispute that, but when you have a district with 180,000 students, and you look at the class of 1998 and see 71 percent missing in action, one has to wonder what happens. Where do those young people go? What is their future; what does this mean for the state of Michigan?

. . . .

We've waited a long time in this state for improvement, we've heard a lot of new plans—new plans have been coming out of there since I've been down here as a legislature (sic) since 1981. I think it is time for fundamental change—major change that will give these 180,000 thousand (sic) students the opportunity to achieve a quality education. They do not have it now and the repercussions to this state and to those students are severe.

Defendants' Exhibit D, Journal of the Senate, No. 17, March 2, 1999, at 249-50. While the Act currently only applies to the Detroit Public Schools, the Legislature has since clarified its original intent that the School Reform Act applies to any school district that qualified on the date of enactment and to any school district that may become qualified. 2000 PA 230.

Pursuant to the School Reform Act, the old Detroit school board was suspended and a new Reform Board was established. Mayor Archer appointed six members of a new school board, some of whom were non-residents of Detroit.

The seventh member of the Reform Board is the Superintendent of Public Instruction, selected by the State Board of Education.

The Reform Board came about as a result of a desire to improve the Detroit Public Schools, a school system many had identified as in distress. In 1997, the old school board initiated a study of the Detroit Public School System. The board asked New Detroit, Inc., a non-profit group whose mission is to improve the social and economic status of Detroiters, to conduct this study and to provide specific recommendations for improvement. New Detroit constituted a Review Panel, and the Panel spent hundreds of hours studying the Detroit Public Schools. In July 1997, the Review Panel issued a report. The report found serious problems with the governance, administration, management, finance, and operations of Detroit Public Schools. The report also noted that Detroit Public Schools students score poorly on achievement tests and that Detroit Public Schools suffers from a high drop out rate. The report recommended immediate and fundamental change at every level. "[There is] an immediate need for a fundamental restructuring of Detroit Public Schools' organization and for dramatic changes in the way people do their jobs at every level of the system." Defendants' Exhibit A, A Plan for Fundamental Change at 10.

> To accomplish the changes contemplated by the Panel, the DPS must launch its restructuring without delay and continue the hard work consistently for years to come. Failure to take decisive action now will further erode the system's credibility and, eventually, cost it the community's faith and backing.

Id. at 3. The Review Panel recommended that the school board appoint an independent implementation team to act swiftly. "[T]he Panel feels strongly that significant and necessary changes must occur over the next year." *Id.* at 30.

The old schoolboard formed an Implementation Team to institute the Panel's recommended changes, changes directed toward the goal of ensuring financial integrity and increasing student achievement. While some progress was made, it was slow and difficult. "[W]ork on the six first year objectives remains uncompleted." Defendants' Exhibit B, Implementation Team's First Year Report at 1. The Implementation Team noted that the school board needed to accelerate the pace of change and to be an aggressive advocate of the needed reforms. *Id.* at 1-2, 23. It was under these circumstances that the Legislature determined that the pace of change was too slow and it passed the School Reform Act to establish the new School Reform Board.

In May of 1999, the Reform Board appointed Dr. David Adamany as CEO. Pursuant to the Act, within ninety days after his appointment, Adamany was required to develop a school district improvement plan, detailing academic, financial, capital, and operational strategies, goals, and benchmarks. In July of 1999, Dr. Adamany presented a Preliminary School Improvement Plan to the Reform Board. Defendants' Exhibit E, Preliminary Plan. The Preliminary Plan, like the New Detroit Review Panel, indicated that Detroit Public Schools was in deep distress. It noted that Detroit students are graduating at two-thirds the rate of other Michigan students, and that eleventh graders are over 27% behind the state average in reading and writing, over 41% behind in math, and over 38% behind in science. The Plan indicated that none of the Detroit Public Schools fiscal or administrative operations met acceptable standards and that Detroit Public Schools facilities are deteriorated and outdated. *Id.*, Preliminary Plan at 3-5. Like the State Legislature, Dr. Adamany noted in the Plan that the distress of the Detroit Public School District, the largest district in the State, has an enormous impact on the State as a whole.

> The distress of the Detroit Public Schools is no small matter. Its greatest impact falls on the 180,000 young people who study in the district. But it also affects the future of the City: if Detroit is to prosper, it must have an educated work force; if it is to have vibrant self government, it must have an educated citizenry. The distress of the Detroit Public Schools spreads well beyond the district's borders because of Detroit's size and centrality. . . . As every metropolitan region in America is discovering, its future is tied inextricably to its central city.

Id., Preliminary Plan at 7. The Preliminary Plan proposed guidelines for changes and estimated the costs of such change.

The statute provides that the CEO report annually on the school improvement plan. Mich.Comp.Laws Ann. § 380.373(7). In June of 2000, Dr. Adamany issued the first annual report. Defendants' Exhibit L, Report. The report indicated that Adamany and the Reform Board instituted numerous changes. For example, the Reform Board spent an unprecedented $79 million in the summer of 1999 to repair school buildings. *Id.* at 5. The Board aggressively recruited and hired over 700 new teachers, *id.* at 6, and implemented a program to reduce class size in grades one through three from a student teacher ratio of 30 to 1 to 17 to 1. *Id.* at 10. The Report also indicated that while Detroit voters approved the issuance of a $1.5 billion bond in 1994, the old school board failed to use its authority to do so. "Indeed, a review of the use of the bonding authority approved in 1994 reveals a record of poor planning, incompetence, and waste." *Id.* at 23. Thus, Dr. Adamany and the Reform Board developed a seven year plan for the school bond program, calling for renovation of 50 buildings and construction of 69 new schools. *Id.* at 22-

25. Dr. Adamany's term as CEO ended June 30, 2000, and the Reform Board appointed a new CEO, Dr. Kenneth Burnley, effective July 1, 2000.

Plaintiffs' First Amended Complaint alleges that Public Acts 10 and 23, which constitute the School Reform Act, are unconstitutional on their face and as applied under the Michigan and U.S. Constitutions,[2] and that they violate the Voting Rights Act. The First Amended Complaint sets forth the following allegations:

> Count I—The Public Acts violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and they violate the Equal Protection Clause of the Michigan Constitution, Mich. Const.1963, Art. 1, § 2. Plaintiffs allege that the Public Acts invidiously discriminate against Detroit residents by denying them the fundamental right to vote for their local school board.
>
> Count II—The Public Acts violate the Equal Protection Clause of the Fourteenth Amendment because they declare members of the prior elected school board to be ineligible for appointment to the Reform Board.
>
> Count III—The Public Acts violate section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, because they deny and abridge the right to vote on account of race, as the City of Detroit is the only city affected by the Acts and the City of Detroit is over 70% black.
>
> Count IV—The Acts violate the Fourteenth and Fifteenth Amendments because the Acts deprive citizens their right to vote on account of their race. This Count also alleges that the Defendants conspired to violate voting rights, in violation of 42 U.S.C. § 1985(3).

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[2] Plaintiffs' claims of violations of the U.S. Constitution under Counts I, II, IV, VI, and VII fall under 42 U.S.C. § 1983.

Count V—The Defendants enacted the Public Acts in violation of the Michigan Constitution's local acts provision, Art. 4, § 29. Under this provision, the legislature may not pass any local or special act unless approved by two- thirds vote of the legislature and approved by a majority of electors.

Count VI—The Local Acts deprive citizens of the right to vote in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and in violation of the Due Process Clause of the 1963 Michigan Constitution, Art. 1, § 17.

Count VII—Public Act 23 retaliated against Marvis Cofield for the exercise of his First Amendment rights by eliminating his right to veto the Reform Board's appointment of a CEO.

Plaintiffs' Motion for Summary Judgment includes additional First Amendment claims. In their motion, Plaintiffs allege that the School Reform Act violated the First Amendment by "penalizing Detroit for its opposition to the plans of the Governor and the Mayor" and "by permanently disqualifying from appointment to the School Reform Board persons who had been elected by the citizens of the City of Detroit." Plaintiffs' Motion for Partial Summary Judgment and Answer to Defendants' Motion for Summary Judgment, p. 1 [hereinafter cited as Plaintiffs' Motion for Summary Judgment].

Plaintiffs' Motion for Summary Judgment also includes a claim that the School Reform Act violates Article 7 Section 22 of the Michigan Constitution (the Home Rule section) because it allegedly amends the Detroit City charter without a vote of the citizens of Detroit. Plaintiffs' Motion for Summary Judgment, p. 20.

The First Amended Complaint seeks preliminary and permanent injunctive and declaratory relief by asking that the Court:

a) declare 1999 PA 10 unconstitutional;

b) restrain the Reform Board and its CEO from exercising authority under the Act;

c) restrain the Mayor of the City of Detroit from appointing any further members of the school board;

d) restrain the Governor of the State of Michigan from sponsoring further legislation to deny Detroit citizens the right to vote for their school board;

e) reinstate an elected school board;

f) grant attorney fees and costs and "further relief as is just and equitable."

Now, Plaintiffs have filed a Motion for Partial Summary Judgment. Plaintiffs contend that they are entitled to judgment as a matter of law on their claims under the Michigan Constitution's Local Acts provision, the Voting Rights Act, and the First Amendment. They contend that there are issues of fact regarding whether the School Reform Act violates the Fourteenth and Fifteenth Amendments. Defendants Adamany, School Reform Board, and Archer have filed a Motion for Summary Judgment, and Defendant Governor Engler filed a separate Motion for Summary Judgment arguing that all of Plaintiffs' claims fail as a matter of law.

II. Standard of Review

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a

matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323, 106 S.Ct. 2548. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Summary judgment is appropriate even where state of mind is an issue; the non-movant may not defeat a motion by merely asserting that a jury might disbelieve the movant's denial. To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. 2505.

III. Analysis

A. Nonjusticiable Political Question

Defendants Adamany, Archer, and the Reform Board argue that this Court lacks jurisdiction over this matter because the issues Plaintiffs raise are nonjusticiable political questions. No other party has briefed this issue. Defendants argue that the issue of "which method of reform is best for the Detroit Public Schools" is an issue of public policy best left to the Michigan Legislature.

A case presents a nonjusticiable political question when one of the following circumstances is present:

> 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> 2) a lack of judicially discoverable and manageable standards for resolving it;
>
> 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> 4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;
>
> 5) an usual need for unquestioning adherence to a political decision already made; or
>
> 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

U.S. v. Newman, 889 F.2d 88, 96 (6th Cir.1989) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

Defendants claim that this case meets the test because: 1) the Michigan Constitution charges the Legislature with the duty to maintain public education; 2) courts are not in the business of making policy decision regarding education; and 3) an injunction against the School Reform Act would negate the legislative process. Defendants argue that the Court should not make policy decisions regarding the path of school reform in Michigan because this is a decision that properly lies with the State Legislature; it is a nonjusticiable political question.

Defendants' argument is without merit because it is premised upon an erroneous characterization of Plaintiffs'

claim. Plaintiffs have not asked this Court to make any policy decisions regarding education. Plaintiffs do not ask this Court to choose between various methods or paths of reform. Instead, Plaintiffs raise various constitutional challenges to the School Reform Act. Courts are commonly called upon to make these types of decisions, and the Court's jurisdiction here is not barred by the political question doctrine.

B. Michigan Constitution's Local Acts Provision

Plaintiffs contend that the School Reform Act was passed without a two-thirds vote and a referendum vote in violation of the Michigan Constitution's local acts provision, Art. 4, § 29. Article 4, section 29 provides specifically:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by the majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

The local acts provision was made part of the Michigan Constitution in order to avoid state legislation which interfered with purely local matters and to avoid faulty judgment exercised by state legislators whose districts would have no interest in the local act.

> In the first place much of the legislation thus enacted [*i.e.* local acts] constituted a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government. In the second place, such legislation affecting as it did certain limited localities in the state, the Senators and Representatives from

> unaffected districts were usually complaisant, and agreed to its enactment without the exercise of that intelligence and judgment which all legislation is entitled to receive from all the members of the Legislature.

Attorney General v. Lacy, 180 Mich. 329, 146 N.W. 871, 874 (1914). Plaintiffs assert that the Act is local legislation that was not approved by two-thirds vote of the legislature and by a majority of electors.

Plaintiffs' claim is without merit, as the School Reform Act is not "local" legislation for two reasons: 1) the Legislature retains authority over school districts and 2) the Act is not directed to a single city, but instead applies to all school districts based on their population.

The Michigan Constitution requires that the State Legislature encourage education and maintain and support public elementary and secondary schools. Mich. Const. Art. 8, §§ 1 & 2. Supervision over all public education is vested in a state board of education. Mich. Const. Art. 8, § 3. Courts have interpreted these provisions of the Michigan Constitution broadly, and have held that the Michigan Legislature is vested with control over public school systems in this State.

> Unlike the delegation of other powers by the legislature to local governments education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it such. *Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.* The policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given it by the legislature.

Lansing School Dist. v. State Bd. of Educ., 367 Mich. 591, 116 N.W.2d 866, 868 (1962) (emphasis added). "It is

axiomatic that, under the laws of this State, school matters are subject to the control of the legislature and are matters of State concern." *School Dist. No. One Fractional v. School Dist. No. Two Fractional*, 340 Mich. 678, 66 N.W.2d 72, 73 (1954).

In fact, the Michigan Supreme Court long ago established that school districts are state agencies. *Attorney General v. Lowrey*, 131 Mich. 639, 92 N.W. 289, 290 (1902). School districts do not exist except as provided by the State; they have no functions, rights, or powers except as provided by the State. *East Jackson Public Schools v. State*, 133 Mich.App. 132, 348 N.W.2d 303, 306 (1984). *See also Bradley v. Milliken*, 484 F.2d 215, 246 (6th Cir.1973) (public school system is State function and school districts are instrumentalities of State created for administrative purposes), *reversed on other grounds*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). "Education is not part of the local self-government inherent in the township or municipality except so far as the Legislature may choose to make it such." *Jones v. Grand Ledge Public Schools*, 349 Mich. 1, 84 N.W.2d 327, 329 (1957) (quoting *MacQueen v. Port Huron City Comm'n*, 194 Mich. 328, 160 N.W. 627 (1916)).

Moreover, the selection of school officials is within the discretion of the State Legislature. *Penn School Dist. No. 7 v. Board of Educ. of Lewis-Cass Intermed. School Dist.*, 14 Mich.App. 109, 165 N.W.2d 464, 472 (1968). In *Penn School District*, plaintiffs sought to enjoin a local board of education from conducting a school district reorganization pursuant to a state statute permitting the reorganization. The complaint alleged that the statute was unconstitutional because the method of selecting committees charged with the reorganization was improper. The court upheld the statute explaining, "The authority granted by the constitution to the legislature to establish a common or primary school system carried with it the authority to prescribe what officers should

be chosen to conduct the affairs of the school-districts (sic), to define their powers and duties, their term of office, and how and by whom they should be chosen." *Id.*, 165 N.W.2d at 473 (quoting *Belles v. Burr*, 76 Mich. 1, 43 N.W. 24, 26 (1889)).

Plaintiffs argue that the School Reform Act is local legislation, relying on the broad language in *Common Council of City of Detroit v. Engel*, 202 Mich. 536, 168 N.W. 462 (1918). In *Engel*, the plaintiff, Council of Detroit sought a writ of mandamus to compel the defendant, the city controller, to perform his official duty and prepare and transmit school bonds bearing an interest rate of more than 4%. The city controller refused to prepare the bonds because a state statute limited the interest rates on Detroit school bonds to no more than 4%. The plaintiff contended that the statute limiting the interest rate was invalid because it was passed in violation of the local acts provision of the Michigan Constitution. The court held that the statute was an unconstitutional local act, as it explicitly applied only to the City of Detroit. The court found that even though the state has broad powers to control education, it is not exempt from the limits of the local acts provision of the state constitution.

Defendants contend that *Engel* has been impliedly overruled by the more recent Michigan Supreme Court decision in *Hart v. County of Wayne*, 396 Mich. 259, 240 N.W.2d 697 (1976). While this Court does not read *Hart* as overruling *Engel*, *Hart* did distinguish and limit *Engel* and the Court finds that the *Hart* case is more closely analogous to the case at hand. The plaintiff in *Hart* claimed that a state statute requiring counties to supplement the salaries of state court judges who sat in those counties violated the local acts provision of the Michigan Constitution. In that case, a county resident and taxpayer objected to the statute and sought to enjoin Wayne County from supplementing the salaries of Detroit Recorder's Court judges. While Detroit voters

approved the statute by referendum, the law was not put to a referendum vote by Wayne County voters. *Id.*, 240 N.W.2d at 699. The court rejected the argument that the statute violated the local acts provision. The court refused to apply *Engel* because in *Engel* the statute was expressly directed toward a specific locality, namely Detroit. The statute at issue in *Hart* applied generally, as it provided that all counties must supplement the salaries of state court judges.

The *Hart* court reasoned that the state legislature had the power to establish and fund municipal courts and that the Recorder's Court was a state court which performed a state function. *Id.* at 702. Further, the court reasoned that because the Michigan Constitution gave the legislature the power to establish the courts, the legislature should also be able to modify the courts without a referendum. *Id.* at 703.

The court in *Hart* also emphasized that the funding of the judiciary was a "unique situation presenting overriding state concerns." *Id.* at 701. The court relied on other cases upholding legislation in the face of a local acts challenge due to the fact that the matter was an area of state concern. *See e.g., City of Ecorse v. Peoples Community Hosp. Authority*, 336 Mich. 490, 58 N.W.2d 159 (1953) (upholding statute allowing creation of authorities to create hospitals because health is matter of statewide concern); *People v. De Meaux*, 194 Mich. 18, 160 N.W. 634 (1916) (upholding statute authorizing judge from one district to substitute in another district because judges administer justice on behalf of the State, not on behalf of a locality; rejecting claim that citizens of district have right to vote for judges in their district). Education, like supervision of the courts, is also a matter of state-wide concern. *Lansing*, 116 N.W.2d at 868.

Hart applies here. When the State Legislature passed the School Reform Act, it did not pass local legislation. The Act does not apply only to one locality like the statute did in *Engel*. It applies to all "qualifying" school districts, districts

of at least 100,000 students. While the Act currently only applies to the Detroit Public Schools, by its terms it will automatically apply to any school district that may hereafter become qualified. 2000 PA 230. The Michigan Legislature has the power to encourage, maintain, and support public education, and a school district is a creation of and an agency of the State. In other words, when it enacted the School Reform Act, the Michigan Legislature merely exercised appropriate state authority over a state agency, a school district. Moreover, the supervision over and improvement of the largest school district in the State is a matter of overriding state concern. Both the State Legislature and Dr. Adamany emphasized that the distress suffered by the Detroit Public Schools has a tremendous impact on the State. "The distress of the Detroit Public Schools spreads well beyond the district's borders because of Detroit's size and centrality." Defendants' Exhibit E, Preliminary Plan at 7.

Plaintiffs also argue that the School Reform statute, as originally enacted, applied only to Detroit and thus was invalid local legislation. Plaintiff points out that the Act referred to "*the* qualifying school district." 1999 PA 10 § 373(6). Also, the Act provided one time limit for mayoral appointments to the school reform board by providing, "not later than thirty days . . . the mayor shall appoint a school reform board. . . ." 1999 PA 10 § 372(1). Plaintiff contends that this case is analogous to *Mulloy v. Wayne County Board of Supervisors*, 246 Mich. 632, 225 N.W. 615 (1929), which struck down as an unconstitutional local act a statute that permitted Wayne County to appoint a civil service commission. While the statute in *Mulloy* applied to counties of 300,000 or more, it specifically referred to *the* county and clearly meant only Wayne County. The Mulloy court held that a statute which by its terms applied only to one county created a closed class and was a prohibited local act.

The fact that a statute contains a population classification which limits its application does not necessarily make the act a local act. Here the State Legislature passed an amendment that amended the School Reform Act to clarify the Legislature's original intent that the Act apply to any school district that qualified on the date of enactment and to any school district that hereafter may become qualified. 2000 PA 230. Public Act 230 provides:

> The amendments made by the amendatory act . . . are intended to reaffirm the legislature's initial intent to apply those sections and part 5a and sections 449 and 471a of the revised school code . . . to any school district that was a qualifying school district under part 5a of the revised school code at the time of enactment of 1999 PA 10 *or that may hereafter become a qualifying school district.*

Id. (emphasis added). While the School Reform Act at the moment applies only to Detroit because currently Detroit is the only school district in Michigan with at least 100,000 students, the statute defines "qualifying school district" in a permissible open-ended manner. The Act will become applicable to other school districts as they gain population. *Mulloy* does not apply because there the statute applied to a closed-class; it did not apply to other counties as they grew.

Further, Plaintiffs' argument that the Court should evaluate their claim based on the statute as it was first enacted, without considering the 2000 amendment, is unavailing. Statutory amendments which merely confirm existing rights and do not take away vested rights may be applied retroactively. *Hansen-Snyder Co. v. General Motors Corp.*, 371 Mich. 480, 124 N.W.2d 286, 288 (1963). *See Stott v. Stott Realty Co.*, 288 Mich. 35, 284 N.W. 635, 640 (1939) (curative statutes which do not impair vested rights may authorize prior legitimate exercise of power). Further, an amendment of a statute

is not a legislative acknowledgment that the statute is invalid; it is a common practice to amend a statute to clarify the law. *U.S. v. Tapert*, 625 F.2d 111, 121 (6th Cir.1980).

Plaintiffs also contend that a classification by population cannot be sustained where the classification does not have a reasonable relationship to the subject matter of the legislation. *Attorney General v. Lacy*, 180 Mich. 329, 146 N.W. 871, 874 (1914). In *Lacy*, the court held that an act imposing special domestic relations and juvenile laws on counties above a certain size was unconstitutional because there was no reason why residents of a large county, in that case Wayne County, should be subject to domestic relations rules that were different from those applicable to residents of other counties.

In contrast, in *Lucas v. Board of County Road Commissioners*, 131 Mich.App. 642, 348 N.W.2d 660 (1984), the court held that a statute that applied only to Wayne County was not a prohibited local act. The statute authorized the county executive to appoint road commissioners in counties having a population of at least 1.5 million. The court found that the population classification was reasonably related to the subject matter of the statute because more populated areas "present problems of governmental management and control different in kind, quality and magnitude" from those faced by less populated areas. *Id.*, 348 N.W.2d at 666. *Accord Ace Tex Corp. v. City of Detroit*, 185 Mich.App. 609, 463 N.W.2d 166, 170 (1990) (court upheld legislation authorizing cities of one million or more to collect utility user taxes to fund the hiring and training of police because major metropolitan areas have greater problems preserving public peace). "Once the validity of a population factor is recognized, the Legislature's choice as to where to draw the line, unless patently arbitrary, must be upheld. . . ." *Lucas*, 348 N.W.2d at 666.[3]

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[3] It should also be noted that even before the passage of the School Reform Act, the Michigan Legislature classified school districts based on

Courts have recognized expressly that school districts of different sizes present different management issues. *MacQueen v. City Commission of Port Huron,* 194 Mich. 328, 160 N.W. 627 (1916) (legislation that provided school districts the authority to borrow money and issue bonds based on their size was upheld). *See also Hearne v. Board of Education,* 185 F.3d 770, 775 (7th Cir.1999) (legislature had rational basis for enacting legislation that changed bargaining rights of Chicago school employees because of large scale of Chicago school operations compared to other districts).

The population qualification set forth in the School Reform Act is rationally related to the subject matter of the legislation. Approximately 10% of Michigan's students are educated in the Detroit school district. While other school districts also have problems with graduation rates, test scores, and finances, the problems faced by a school district having 100,000 or more students are different in quality and magnitude from those faced by smaller school districts. In sum, the School Reform Act is not a prohibited local act; thus, Plaintiffs' claim that the Act violates the Article 4 section 29 of the Michigan Constitution must be dismissed.[4]

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size. Prior to the passage of the School Reform Act, there were two classifications of schools, general powers school districts and first class school districts. Mich.Comp.Laws Ann. § 380.11. First class districts were those of 120,000 students or more, Mich.Comp.Laws Ann. § 380.402, and thus Detroit was the only first class school district in the state. 1999 PA 10 amended the Revised School Code by lowering the enrollment districts defined as first class to 100,000 students and by creating a the School Reform Board discussed above.

[4] Plaintiffs frame part of their argument regarding the Michigan Constitution's local acts provision as a right to vote issue by asking, "how is size related to the exercise of the right to vote?" Plaintiffs' Motion for Summary Judgment, p. 19. The right to vote issue is addressed *infra.*

C. Michigan Constitution's Home Rule Provision

Plaintiffs claim that the School Reform Act violates Article 7 Section 22 of the Michigan Constitution, the home rule provision, because it allegedly amends the Detroit City Charter without a vote of the citizens of Detroit. Plaintiffs reason that the current Detroit City Charter empowers the mayor with authority over various city departments but grants no authority over education, and that the School Reform Act's grant of mayoral power to appoint school board members effectively amended the charter without the requisite vote by citizens of Detroit.

Section 22 of Article 7 provides that the electors of each city "shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city." The School Reform Act does not amend the charter because the charter does not contain any provisions which govern the schools. As explained above, the schools are governed by the State.

Further, the home rule provision itself expressly recognizes that the power of the city is subject to the general laws of the State Legislature. "Each such city and village shall have the power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and the law*." Mich. Const. Art. 7, § 22. Thus, even if the terms of the School Reform Act directly conflicted with the Detroit City Charter, the Act would prevail because city charters are subject to the general laws of the State. *Kalamazoo v. Titus*, 208 Mich. 252, 175 N.W. 480 (1919).

D. Voting Rights Act

Plaintiffs also allege that the School Reform Act violates section 2 of the Voting Rights Act by denying the citizens of Detroit the right to vote for members of the school board. The Voting Rights Act provides, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall

be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

Plaintiffs' claim under the Voting Rights Act is meritless. The Sixth Circuit recently upheld similar legislation in the face of a Voting Rights Act challenge in *Mixon v. Ohio*, 193 F.3d 389 (6th Cir.1999). In that case, the state legislature had passed a statute allowing the mayor of Cleveland to appoint a new school board. The court held that section 2 of the Voting Rights Act applies only to elective, not to appointive processes, and thus the Voting Rights Act did not apply to appointed school board members. Further, the Supreme Court has held that a state can avoid application of the Voting Rights Act by changing from an elective to an appointive process. *Chisom v. Roemer*, 501 U.S. 380, 401, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). *See Sailors v. Kent Board of Educ.*, 387 U.S. 105, 110-11, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967) (no constitutional reason why officers of nonlegislative character may not be chosen by governor, legislature, or some other appointive process rather than by election).

Plaintiffs argue that "*Mixon* is irrelevant because the Ohio legislation at issue in that case did not subject the appointed board imposed upon Cleveland to a veto by an official responsible to a statewide electorate." Plaintiffs do not elaborate upon this argument, and thus they do not explain why the State Superintendent's veto power over the appointed board's choice of CEO is relevant to Plaintiffs' voting rights claim. The fact is that *Mixon* is directly on point and its holding applies to this case. Section 2 of the Voting Rights Act does not apply to appointive processes, and, under *Chisom*, the State Legislature is free to change the process from an elective process to an appointive process.

Plaintiffs erroneously argue that *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)

applies. In *Allen*, the Supreme Court found that a change in the Mississippi Code which called for the appointment instead of the election of the superintendent of education had to be scrutinized to determine if it complied with section 5 of the Voting Rights Act. Section 5 applies only to states with a record of voting discrimination, and it requires preclearance of proposed changes in election procedures that affect voting rights. *Mixon*, 193 F.3d at 407. Section 5 does not apply to Michigan, 28 C.F.R. § 51.4, and thus, neither does *Allen*.

Plaintiffs finally argue that section 2 of the voting rights act is broader than section 5, relying on *Reno v. Bossier Parish School Board II*, 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). There, the Supreme Court held that an at large voting system for school board was not subject to preclearance under section 5 of the Voting Rights Act because neither its purpose nor its effect was to discriminate against black voters. However, the Court noted:

> [Preclearance] does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive [of black votes] than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of Section 5, but must be attacked through the normal means of a Section 2 action.

528 U.S. at 335, 120 S.Ct. at 875.

Reno is inapposite. It dealt with redistricting and the issue of vote dilution under section 5. It did not address the issue of legislation replacing an elective system with an appointive system. The *Reno* court itself recognized, "[O]ur holding today does not extend to violations consisting of an outright 'denial' of an individual's right to vote, as opposed to an 'abridgement' as in dilution cases." 528 U.S. at 338 n. 6, 120 S.Ct. at 877 n. 6.

E. Equal Protection

Plaintiffs next contend that the School Reform Act violates their right to equal protection under the Fourteenth Amendment and the equal protection clause of the Michigan Constitution.[5] Classifications that involve a fundamental right or a suspect class must pass the strict scrutiny test and such classifications are upheld only if they are necessary to promote a compelling government purpose. Classifications that do not involve a fundamental right or a suspect class are subject to a rational basis test. Under that test, it is permissible to treat classes of persons differently if the legislation is rationally related to a legitimate state purpose. *Mixon*, 193 F.3d at 402. *Anderson v. City of Detroit*, 54 Mich. App. 496, 221 N.W.2d 168 (1974) (absent suspect class or involvement of fundamental right, statute only needs rational basis to be upheld in face of equal protection challenge under Michigan Constitution). Plaintiffs assert that the Court should apply strict scrutiny and should find that the School Reform Act violates their right to equal protection because:

> 1) the statute denies Detroit voters the "fundamental" right to vote for their school board;
>
> 2) the statute prohibits former school board members from serving on the board, and thus deprives Plaintiffs of their "fundamental" right to retain their elected representatives; and

---

[5] The Fourteenth Amendment to the U.S. Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Michigan Constitution, Article 1, Section 2, similarly provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.

3) the statute deprives Plaintiffs of the right to vote on account of their race.

Contrary to Plaintiffs' assertion, there is no fundamental right to vote for members of a school board. The Sixth Circuit flatly rejected a claim identical to Plaintiffs' claim in *Mixon*. "[T]here is no fundamental right to elect an administrative body such as a school board, even if other cities in the state may do so." 193 F.3d at 403. *Accord Lansing School Dist. v. State Bd. of Educ.*, 367 Mich. 591, 116 N.W.2d 866 (1962) (legislature did not give right to vote on annexation of territory to school district, thus no violation of equal protection to deny one district right to vote on annexation).

Just as there is no fundamental right to vote for members of a school board, there is no fundamental right to retain an elected official. Where offices are created by statute, the Legislature may abolish the offices even during an incumbent's term. *MacDonald v. DeWaele*, 263 Mich. 233, 248 N.W. 605, 606 (1933). The office of the old school board members was created by statute, by the Michigan Revised School Code. Mich.Comp.Laws Ann. § 380.401 et seq. Thus, the Michigan Legislature had the authority to modify or abolish the old school board.

Plaintiffs also assert that the School Reform Act violates their right to equal protection because it deprives them of the right to vote due to their race. To make out such a claim and to survive summary judgment, Plaintiffs must bring forth some evidence of a racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). "When a facially neutral rule is challenged on equal protection grounds, the plaintiff must show that the rule was promulgated or reaffirmed *because of*, not merely in spite of, its adverse impact on persons in plaintiff's class." *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 276 (6th

Cir.1994) (emphasis in original). "The type of impact sufficient in itself to prove intentional discrimination is that which is significant, stark, and unexplainable on other grounds." *Id.* at 276. Absent a showing of arbitrariness or irrationality, to determine whether invidious race discrimination was a motivating factor demands an inquiry into circumstantial and direct evidence of intent including: 1) the impact of the official action; 2) the historical background of the official action; 3) the specific sequence of events leading up to the challenged decision; 4) any procedural or substantive departures from the norm in connection with the official action; and 5) the legislative history of the official action. *Arlington Heights*, 429 U.S. at 266-67, 97 S.Ct. 555.

The Seventh Circuit recently rejected an equal protection challenge to school reform in Chicago. In *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770 (7th Cir.1999), school district employees challenged legislation restricting their bargaining rights, claiming that the legislation had a racially disparate impact. The court dismissed their equal protection claim, noting that there are substantial numbers of African-Americans in many other Illinois cities and "it is simply too great a stretch to say that the population represented by the Chicago school system is such a good proxy for African Americans that the ostensibly neutral classification is 'an obvious pretext for discrimination.'" 185 F.3d at 775-76. *See also Anthony v. Michigan*, 35 F.Supp.2d 989, 1004 (E.D. Mich.1999) (rejecting equal protection challenge to merger of Detroit Recorder's Court with Wayne County Circuit Court because no evidence race was a motivating factor).

The School Reform Act is racially neutral on its face. While Plaintiffs do not argue that the history, context, or procedure by which the School Reform Act was enacted evidence racist intent, Plaintiffs do claim that the impact of the School Reform Act reveals racist intent. Plaintiffs reason that because the Act affects a school district that is

predominantly African-American and the Michigan Legislature knew this when it enacted the statute, the purpose of the statute was to discriminate on account of race. However, Plaintiffs cite no evidence whatsoever of racial bias or motive. Plaintiffs merely argue that there is a correlation between high drop out rates and low test scores and poverty and race and that there are school districts with worse test scores that are unaffected by the reform legislation. Even assuming that all this is true, it simply does not follow that the School Reform Act was racially motivated.

Because Plaintiffs cite no evidence of purposeful discrimination, the rational basis test applies. Under the rational basis test, the classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). The state does not even have to produce evidence to support the challenged legislation, as it may be supported based on "rational speculation." *Id.*

In *Mixon*, the Sixth Circuit applied the rational basis test and upheld the school district legislation that allowed Cleveland's mayor to appoint a new school board, finding "state legislatures need the freedom to experiment with different techniques to advance public education and this need to experiment alone satisfies the rational basis test." *Mixon*, 193 F.3d at 403. Further, the sheer size of the largest school district in the state supports a rational basis for the legislation. *Hearne*, 185 F.3d at 775-76 (size of Chicago school system implicated concerns different from those in other districts). Other reasons for having an appointed school board instead of an elected one include a need to insulate school boards from direct political pressures, to encourage the service of individuals who might not be willing to run for public office, and to promote diverse viewpoints that might not obtain representation on an elected board. *Irby v. Virginia State Bd.*

of Elections, 889 F.2d 1352, 1355 (4th Cir.1989). Here, the legislative history reveals that the Act's purpose was to improve education for students in the largest school district in the state. "I think it is time for fundamental change—major change that will give these 180,000 thousand (sic) students the opportunity to achieve a quality education. They do not have it now and the repercussions to this state and to those students are severe." Defendants' Exhibit D, Journal of the Senate, No. 17, March 2, 1999, at 249-50 (comments of Senator DeGrow).

Plaintiffs argue that *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), applies. In *Romer*, the Court held that the Colorado Constitution could not be amended to prohibit local government from enacting legislation to protect homosexuals. "A law declaring that it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633, 116 S.Ct. 1620. The Court found no legitimate state purpose to legislation imposed on this single group of people. In contrast, here, the School Reform Act was designed to address specifically identified problems, to advance education in the largest school district in the State. *Romer* is inapposite.

In sum, because Plaintiffs do not assert a fundamental right and because they have brought forth no evidence of intentional race discrimination, the strict scrutiny test does not apply. Instead, the Court must apply the rational basis test. The need of the Michigan Legislature to experiment with different techniques to advance public education alone satisfies the rational basis test. *Mixon*, 193 F.3d at 403. Plaintiffs have failed to come forward with specific evidence showing that there is a genuine issue of fact for trial, *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348, thus their equal protection claim must be dismissed.

F. Fifteenth Amendment

Plaintiffs contend that the School Reform Act violates the Fifteenth Amendment by depriving them of the right to vote on account of their race. A statute that is racially neutral on its face violates the Fifteenth Amendment only if it is motivated by a discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The School Reform Act is facially neutral, and, as explained above, Plaintiffs have failed to bring forth evidence of a discriminatory purpose. Thus, Plaintiffs' claim under the Fifteenth Amendment must be dismissed. Also, because Plaintiffs claims under the Fourteenth and Fifteenth Amendments are dismissed, their claim alleging a conspiracy to violate voting rights under 42 U.S.C. § 1985(3) also must be dismissed.

G. First Amendment

Plaintiffs allege that the Legislature, when it enacted 1999 PA 23, retaliated against Marvis Cofield for the exercise of his First Amendment rights by eliminating his right to veto the Reform Board's appointment of a CEO. Plaintiffs allege that the Governor and Legislature changed the unanimous voting requirement in order to side step the veto of the appointment of Dr. Adamany by Mayoral appointee, Marvis Cofield. Plaintiffs allege that it was improper to remove the veto vote of Cofield, who is black, and retain the veto power of the Superintendent, who is white. Plaintiffs also allege that their First Amendment rights were violated by the old school board members' disqualification from appointment to the new Reform Board.

Plaintiffs bear the burden of proving standing, that they have suffered an injury in fact, an injury which is concrete, particularized, and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). *See Anthony v. Michigan*, 35 F.Supp.2d 989, 991

(E.D.Mich.1999) (Detroit registered voters who were plaintiffs failed to set forth a concrete and particularized injury due to merger of Recorder's Court with Wayne County Circuit Court). Cofield and the former school board members are not named plaintiffs in this action and Plaintiffs do not have standing to allege a violation of their First Amendment rights.

Plaintiffs also allege that the School Reform Act violated the First Amendment by "penalizing Detroit for its opposition to the plans of the Governor and the Mayor and by permanently disqualifying persons from appointment to the School Reform Board persons who had been elected by the citizens of the City of Detroit." Plaintiffs' Motion for Summary Judgment, p. 1. As discussed above, there is no fundamental right to vote for members of an administrative body such as a school board. *Mixon*, 193 F.3d at 403. Further, there is no fundamental right to retain an elected official. *MacDonald*, 248 N.W. at 606 (legislature may abolish offices created by statute even during incumbent's term). Accordingly, Plaintiffs' First Amendment claim is hereby dismissed.

IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons explained above, the Court hereby orders as follows:

Plaintiffs' Motion for Partial Summary Judgment is DENIED.

Defendants Adamany's, School Reform Board's, and Archer's Motion for Summary Judgment is GRANTED;

Defendant Governor Engler's Motion for Summary Judgment is GRANTED.

Accordingly, this case is hereby DISMISSED.

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

Amendment XV. Universal Male Suffrage

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX H

42 USC § 1973. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 USC § 1973c. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting

qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively

indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Supreme Court, U.S.
FILED
DEC 11 2002
CLERK

No. 02-711

In the Supreme Court of the United States

HELEN MOORE, *et al*

Petitioner,

v

DETROIT SCHOOL REFORM BOARD, *et al*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT GOVERNOR OF THE STATE OF MICHIGAN JOHN ENGLER'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 USC § 1973 empower the Courts to review the Michigan Legislature's exercise of fundamental sovereign powers concerning the structure and governance of the state's public school system, specifically 1999 PA 10's replacement of elected school boards with appointed school boards in defined qualifying districts, when Michigan is not subject to Section 5 of the Voting Rights Act?

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STATEMENT OF THE CASE

This case involves the validity of a Michigan statute, 1999 PA 10, which replaces elected school boards with appointed boards in qualifying school districts. A qualifying school district is one with a student population of more than 100,000. MCL 380.701, 380.402. Presently, only the Detroit School District has such a student population. App A to Plaintiffs' Petition at 2a, Sixth Circuit Court Opinion (June 12, 2002) (hereinafter "6th Cir Op"). Many people and organizations, including the majority of the Michigan Legislature, believed that the Detroit School District was a district in deep distress, with serious problems in governance, administration, management, finance and operation. *See* App A, 6th Cir Op, at 3a-5a. Detroit Public School students fared poorly on standardized tests and the school system suffered from a high dropout rate. *Id.* at 5a. The majority of the Legislature, and many others, believed that the elected school board had failed to effectively deal with the District's many problems. *Id.* at 3a-5a.

Plaintiffs, a number of Detroit residents and community organizations, filed suit in the United States District Court for the Eastern District of Michigan claiming 1) that 1999 PA 10 had been enacted in violation of various provisions of the Michigan Constitution of 1963, including the provisions governing the passage of local acts, art 4, § 29; 2) that, insofar as it provided for the replacement of an elected school board with an appointed board, 1999 PA 10 violated § 2 of the Voting Rights Act ("VRA"), 42 USC § 1973; and 3) that 1999 PA 10 violated various provisions of the United States Constitution, including the Fourteenth and Fifteenth Amendments. The defendants are the new School Reform Board of the City of Detroit; David Adamany, the person chosen by that Board to be the chief executive officer of the school district; then-Mayor of Detroit, Dennis Archer; and the Governor of the State of Michigan, John Engler.

The Defendants filed motions for summary judgment and the Plaintiffs filed a motion for partial summary judgment. On October 25, 2000 United States District Judge Nancy Edmunds issued an Opinion and Order denying the Plaintiffs' motion for summary judgment and granting the Defendants' motions for summary judgment. A judgment was entered that same day. Plaintiffs immediately filed a Notice of Appeal.

On June 12, 2002, the Court of Appeals for the Sixth Circuit affirmed the District Court decision dismissing this matter in its entirety. On August 9, 2002, the Court denied Plaintiffs' motion for rehearing. In this petition for writ of certiorari, Plaintiffs seek only a review of the lower court's dismissal of their VRA claim.

With respect to the VRA claim, the Sixth Circuit Court of Appeals held that the Plaintiffs' claim was foreclosed by *Mixon v Ohio,* 193 F 3d 389 (6th Cir 1999), that *Mixon* was correctly decided, and that that decision had not been undermined by this Court's decision in *Reno v Bossier Parish School Bd.*, 528 US 320, 145 L Ed 2d 845, 120 S Ct 866 (2000) (*Bossier Parish II*). Specifically, the Court applied *Mixon*'s holding that Section 2 of the VRA only governs elective offices and that appointed offices do not come within the purview of that section of the Act. As the legislative action challenged herein was the replacement of qualifying elected school boards, the Court below held that no Section 2 action exists.

STATEMENT OF FACTS

At issue in this case is a Michigan statute, 1999 PA 10, which provides for the appointment of reform school boards in qualifying school districts. The reform boards, and the chief executive officer which they are required to appoint, take the place and assume the duties and responsibilities of the elected school boards in the qualifying districts. MCL 380.702, 380.703. A qualifying school district as defined by 1999 PA 10 is a school district of the first class. MCL 380.371. A school district of the first class, a classification that previously existed under the School Code, is a district having an enrollment of at least 100,000 students. MCL 380.402. At the time that 1999 PA 10 was enacted, and still today, there is only one school district that meets the definition of a qualifying district, the Detroit School District. App A, 6th Cir Op, at 2a.

1999 PA 10 was enacted in response to serious and persistent problems and shortcomings that had plagued the Detroit School District. Those problems were described in the opinion and order of the District Court. App E to Petition at 41a-47a, District Court Opinion and Order Denying Plaintiffs' Motion for Partial Summary Judgment; Granting Defendants Adamany's, School Reform Board's, and Archer's Motion for Summary Judgment; and Granting Defendant Governor Engler's Motion for Summary Judgment, pgs. 3-6 (R 84)) (hereinafter "D Ct Op"). The Detroit School District is by far the largest school district in the State of Michigan. App A, 6th Cir Op, at 2a. As a whole, the district suffered from high drop out rates and low achievement. Many people and organizations, including the majority of the Michigan Legislature, believed that the Detroit School District was a district in deep distress, with serious problems in governance, administration, management, finance and operation. *Id.* at 4a-5a. A study of the school district by the nonprofit New Detroit, Inc. had concluded in 1997 that there was "an immediate need for a fundamental restructuring of Detroit public Schools' organization and for dramatic changes in the way people do

their jobs at every level of the system." *Id.* at 3a-4a. Progress in implementing the recommendations made by New Detroit was glacial. *Id.* Additionally, while the voters of the school district had authorized a 1.5 billion dollar bond issue in 1994 to repair school buildings and construct new ones, no monies had actually been spent on those tasks by 1999. *Id.* at 5a. Faced with those circumstances, the Legislature enacted 1999 PA 10 in an attempt to improve conditions in the Detroit School District. *Id.* The Legislature relied in part on studies demonstrating that a change in the governing structure of a school system could lead to improvements in the performance of a school system. (Attachment B to Defendant Engler's Brief in Support of Motion for Summary Judgment (R 69), found at 6th Cir Joint Appendix, Vol 2, pp. 615-626). The Legislature also took note of what had been done legislatively to improve other large urban school districts, most particularly the Chicago school district. (*Id.*)

1999 PA 10 made certain changes to Michigan's Revised School Code, MCL 380.1 *et. seq.* The Act added a new part to the School Code--Part 5A: Appointment of School Reform Boards. Part 5A provides that the mayor of a school district in which a qualifying school district is located shall appoint a 7-member school reform board. MCL 380.372(2). For the first five years, one of those board members must be the state superintendent of public instruction or his designee. *Id.* Except for that person, the members of the school reform board serve at the will of the mayor. MCL 380.372(4). No one who was a current member of the elected school board could serve on the reform board. MCL 380.372(3).

A reform school board is required to appoint a chief executive officer of the school district. MCL 380.374. 1999 PA 10 originally required that the chief executive officer be a unanimous selection of the reform board. MCL 380.374. That provision was amended by 1999 PA 23 to eliminate the unanimity requirement, although the superintendent of public instruction or his designee still had to vote in favor of any selection.

The chief executive officer assumes all of the powers and duties of the elected school board of the school district. MCL 380.373(4). The former elected school board may voluntarily serve as an advisory body. MCL 380.373(1). After 5 years, the question of whether to retain the reform school board must be placed on the ballot. MCL 380.375.

SUMMARY OF ARGUMENT

The establishment and organization of schools is a matter of great importance to State government. The ability to structure and govern the public school system, including the power to make policy decisions regarding the best way to respond to schools in crisis, is a fundamental component of the States' sovereign power and responsibility to serve and protect their citizenry. Plaintiffs submit that, even if a jurisdiction does not have a history of racially discriminatory voting practices sufficient to subject it to review under Section 5 of the VRA, Section 2 of the VRA empowers the courts to encroach upon these fundamental sovereign powers to review the legislative decision to shift from an elective to an appointive system. Plaintiffs' claim is contrary to the express language of Section 2, the legislative history of the Voting Rights Act, the consensus of the federal courts reviewing this issue, this Court's important dicta in *Chisom v Roemer*, 501 US 380, 404, 111 S Ct 2354, 115 L Ed 2d 348 (1991) and to basic principles of federalism, separation of powers and state sovereignty. Plaintiffs do not present an issue warranting this Court's review and Respondent Governor of the State of Michigan John Engler respectfully submits that this petition for writ of certiorari should be denied.

ARGUMENT

I. The Sixth Circuit Court of Appeals correctly held, in conformity with all of the federal courts that have addressed this issue, that a jurisdiction that is not subject to Section 5 of the VRA can replace an elective system for filling public office with an appointive system and that that sovereign decision is not subject to review under Section 2 of the VRA.

A. In *Mixon, supra*, and the instant matter, the Sixth Circuit Court of Appeals correctly held that the language and legislative history of Section 2, as well as the important dicta statements by this Court in *Chisom v Roemer*, dictate finding that the decision to replace an elected school board with an appointed one is not subject to a Section 2 challenge.

Plaintiffs claim that 1999 PA 10 violates § 2 of the Voting Rights Act because it provides for an appointed reform school board and chief executive officer that exercise the powers of the previously elected school board. This claim is unsupported by the language of Section 2 and the legislative history of the VRA and conflicts with the unanimous determinations of all the federal courts that have addressed this issue. Most recently, in *Mixon, supra,* the Sixth Circuit Court of Appeals followed the unanimous view of the federal courts and held that "Section 2 of the Voting Rights Act does not apply to appointive offices." 193 F3d at 408. Significantly, in *Mixon* the Court held that a Section 2 action does not exist even where the challenged public offices had previously been filled through an elective process. *Id.*

In all relevant aspects, the Ohio statute at issue in *Mixon* was identical to the Michigan statute at issue here, 1999 PA 10. The Ohio statute, HB 269, provided for the appointment of school boards in "municipal school districts." *Mixon,* at 395. The only school district that met the definition

of "municipal school district" was the school district that included the City of Cleveland and several of its suburbs. *Id.* at 409. The appointed school board replaced a previously elected school board. *Id.* at 394. H.B. 269 provided that after a period of time an election would be held at which the school district voters would decide whether to continue the appointed board or return to an elected school board. *Id.* at 396.

The Michigan statute at issue here likewise provides for the appointment of school boards in "qualifying school districts." At present the only school district that falls within the definition of "qualifying school district" is the school district of the City of Detroit. An appointed school board, and the chief operating officer it selects, would replace a previously elected board. After five years an election will be held at which the voters of the Detroit School District will decide whether to retain the appointed board or return to an elected school board.

In rejecting the Section 2 challenge in *Mixon*, the Sixth Circuit Court of Appeals relied on the unambiguous language of Section 2. *Mixon, supra,* at 406-408. Section 2 of the VRA provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 173b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally

> open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

As the Sixth Circuit Court of Appeals properly recognized, the plain language of this section refers only to **election** and **nomination**, terms that have no applicability to **appointive** offices. *Mixon,* 193 F 3d at 407. Additionally, Section 2 refers to **representatives.** In *Chisom v Roemer,* 501 US 380, 399-400, 111 S Ct 2354, 115 L Ed2d 348 (1991), this Court defined "representatives" for purposes of determining the scope of Section 2 as meaning the winners of popular elections. Appointed officers do not come within this definition of "representatives."

No doubt it is this unequivocal language of Section 2 that led this Court to state in *Chisom*, after concluding that the Voting Rights Act applied to the election of judges in Louisiana, that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed . . . ." 501 US at 401. Thus, *Chisom* makes clear that the very action challenged herein, the sovereign decision to shift from an elective to an appointive system, is outside the reach of a Section 2 challenge.

Further support for the conclusion that Section 2 does not provide a basis for challenging a sovereign's decision to replace an elective system for filling public office with an

appointive system is found in the legislative history of the VRA. As the *Mixon* Court held, the legislative history of the VRA does not support the existence of a Section 2 action to challenge a shift from an elective system to an appointive system. 193 F 3d at 407-08. Specifically, in *Mixon* the Court found that "[d]espite some cursory language in the legislative history, there is no strong evidence that Congress intended Section 2 to provide a basis for challenging appointive systems." *Id.* (citing S Rep 97-417, at 6 (1982), reprinted in 1982 USCCAN 177, 183 (discussing, among other things, shifts from elective to appointive office.)).

Moreover, in *Mixon* the Court properly recognized that it is significant that Congress did provide for limited review of decisions replacing an elective system with an appointive system when made by certain jurisdictions (i.e., jurisdictions subject to Section 5), but did not explicitly provide for general review of such decisions by all jurisdictions. Section 5 of the VRA dictates that certain jurisdictions must have any changes to election practices or procedures reviewed by the Department of Justice or the Federal District Court for the District of Columbia before they are allowed to go into effect. 42 USC § 1973c; *Mixon,* 193 F 3d at 407. Section 5 review (i.e., "preclearance") examines whether the proposed changes would cause a retrogression of protected minority voting rights and is required only of jurisdictions with a history of voting discrimination. 42 USC 1973c; *Mixon,* 193 F 3d at 407.[1] Thus, the *Mixon* Court concluded:

> **The fact that Section 5 is limited to certain jurisdictions implies that Congress intended to allow other jurisdictions to change from an elective to an appointive system without facing challenges under the Voting Rights Act.** In the absence of contrary congressional intent, we find these reasons sufficient to

[1] The State of Michigan does not have a history of discriminatory voting practices and is not subject to Section 5.

> exclude cases like this one from the purview of the Voting Rights Act. [*Id.* at 408 (emphasis added)]

Finally, in *Mixon* the Court observed that all federal courts that had addressed the issue had determined that § 2 only applied to elective systems and not to appointive systems. *Mixon,* 193 F3d at 407.[2] That is still the case. There is no contrary precedent. Because *Mixon* was properly decided and is on all fours with the instant matter, the lower courts properly applied that decision and dismissed Plaintiffs' VRA claim. Plaintiffs do not present this Court with an issue warranting its review and the petition for writ of certiorari should be denied.

B. Arguments by amici below attempting to distinguish *Mixon* from the instant matter are without merit and should be disregarded if presented to this Court.

The briefs of the amici below make various attempts to distinguish this case from the one facing the *Mixon* Court. These arguments, however, fail to point out any legally significant difference. Because one amicus has already sought a stipulation to file a brief in support of the petition in this Court, the undersigned proffers the following response for the Court's consideration.

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[2] Citing *African-American Citizens for Change v St Louis Bd of Police Comm'rs,* 24 F 3d 1052, 1053 (8th Cir 1994); *Irby v Virginia State Bd,* 889 F 2d 1352, 1357 (4th Cir 1989); *Dillard v Crenshaw County,* 831 F 2d 246, 251 (11th Cir 1987); *Searcy v Williams,* 656 F 2d 1003, 1010 (5th Cir 1981), *aff'd Hightower v Searcy,* 455 US 984, 102 S Ct 1605, 71 L Ed 2d 844 (1982); *African-American Legal Defense Fund, Inc v New York,* 8 F Supp 2d 330, 339 n 14 (SDNY 1998); *African-American Voting Rights Legal Defense Fund, Inc, v Missouri,* 994 F Supp 1105, 1122 (ED Mo 1997), *aff'd per curiam* 133 F 3d 921 (8th Cir 1998); *Prewitt v Moore,* 840 F Supp 436, 440 (ND Miss 1993); *Williams v State Bd of Elections,* 696 F Supp 1563, 1568-69 (ND Ill 1988) (parentheticals omitted).

The brief filed on behalf of the American Civil Liberties Union Fund of Michigan and the Center for Constitutional Rights (The ACLU brief) attempts to distinguish *Mixon* by arguing that Michigan, unlike Ohio, has not adopted a true appointive system for the governance of the school system of the City of Detroit. That argument is based on a claim that the elected school board remains in place, albeit in an advisory role only.

The fact that the elected board may still have some sort of advisory role is irrelevant. The basic statutory function of the elected school board was to direct the operation of the school district. That basic statutory function has now been placed in the hands of an appointed board and the chief executive officer whom it appoints in turn. The system has been changed from an elective system to an appointive system. The holding of the *Mixon* court applies--§ 2 of the Voting Rights Act has no applicability to a change from an elective system to an appointive system.

The elected board has no power or authority after the adoption of 1999 PA 10. MCL 380.373. It is entitled to no compensation, reimbursement, funds or staff. *Id.* It is effectively a nullity. The operation of the school district has been completely committed to the appointed board. Even if the voters eventually decide to return to an elected system, the old elected board does not simply resume its duties. A new school board would be elected. MCL 380.375. The Michigan Legislature gave the old elected board an opportunity to advise the new appointed board. MCL 380.373(1). The role is purely voluntary, however. 1999 PA 10 imposes no duties whatsoever on the old elected board.

The ACLU brief also attempts to distinguish *Mixon* by arguing that the elected school board in Cleveland had already been stripped of its powers by a federal court order and that, therefore, the legislation that provided for an appointed school board did not alter the status of the elected board. Such an argument is factually incorrect. The elected Cleveland Board

of Education was still in place and, once federal oversight of the school system was removed, the elected board would have reassumed its statutory duties. The legislation that provided for an appointed board ended that possibility. The Ohio legislation at issue in *Mixon* resulted in a change from an elected to an appointed school board, just as 1999 PA 10 does in the present case. The holding of *Mixon* applies in both instances: legislation replacing an elected school board with an appointed board does not implicate § 2 of the VRA.

The ACLU brief and Plaintiffs also argue that the fact that a state official is a member of the appointed Detroit Board somehow distinguishes the present case from *Mixon.* There is nothing in the *Mixon* opinion that even hints that the presence of a state official on the appointed school board would have altered the Court's holding. If § 2 of the VRA is not implemented by a change to an appointed school board, how that board is appointed and who serves on the appointed board is irrelevant.

The amicus brief filed on behalf of Rosa L Parks, the Detroit Chapter of the NAACP and others (the NAACP brief) argues that while § 2 of the Voting rights Act may not apply to historically existing appointive systems, it does apply where there is a change from an elected to an appointed system. There is no support for such an argument in the text of § 2. Section 2 contains no grandfather clause. State legislation either violates § 2 or it does not. In this case 1999 PA 10 does not violate § 2. The same legislation would not violate § 2 if it had been enacted 100 years ago. Section 2 simply has no application to appointive positions, because legislation providing for appointive positions does not involve the "election and nomination" of "representatives."

In sum, arguments by amici below do not present any issue warranting this Court's review and the petition for writ of certiorari should be denied.

II. The Court below properly held that *Bossier II* is inapplicable to the issues and facts presented in *Mixon* and in the instant matter and does not undermine the holding that Section 2 does not provide a basis for challenging a non-Section 5 jurisdiction's decision to replace an elective system of filling public office with an appointive system.

Plaintiffs contend that *Mixon* has been undermined by this Court's decision in *Reno v Bossier Parish School Bd.*, 528 US 320, 120 S Ct 866, 145 L Ed 2d 845 (2000) (*Bossier II).* According to plaintiffs, *Bossier II* "holds" that § 2 of the VRA provides broader coverage than § 5 of the Voting Rights Act and, since this Court had previously held that § 5 applied to a statute which changed an elective position to an appointed position (*Allen v State Bd. Of Elections,* 393 US 544, 89 S Ct 817, 22 L Ed2d 1 (1969), § 2 must apply to such a statute as well. *See* Petition for Writ of Certiorari at 12-13, 17.

Plaintiffs' argument is ill founded. *Bossier II* did not hold that § 2 is broader than § 5. And *Bossier II* has no application to the issue present in this case-whether § 2 applies to a statute that results in the replacement of an elected position with an appointed one.

First of all, *Bossier II* involved only § 5 of the Voting Rights Act. As discussed *supra,* Section 5 provides that certain jurisdictions with a history of discriminatory voting practices must obtain preclearance of any statutory change that involves voting qualifications, prerequisites to voting or standards, practices or procedures with respect to voting. 42 USC § 1973c. Preclearance is authorized by the statute if the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* In *Bossier II,* a Louisiana school board sought preclearance of a redistricting plan by filing an action in the United States District Court for the District of Columbia. Preclearance was granted by the District Court. On appeal it was contended by the Attorney General of the United States

and others that preclearance should nevertheless have been denied because, even though the plan did not worsen the situation of minority voters, the plan had a discriminatory purpose. In *Bossier II,* this Court thus defined the issue on appeal in the opening sentence of the majority opinion as follows:

> These cases present the question whether § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, prohibits preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. [528 US at 322-23]

The Court's holding, stated in the final sentence of the majority opinion, was that preclearance in such a situation was not prohibited. *Id.* at 341.

As the foregoing establishes, the issue before this Court in *Bossier II* was not the relationship between § 2 and § 5 of the VRA. Moreover, in *Bossier II* the Court did not hold that the reach of § 2 was coextensive with or greater than the reach of § 5. The Court had no reason to rule on such matters, and it did not.

Plaintiffs, however, misread the Court's one statement regarding the interplay of § 2 and § 5 as a holding regarding the scope of § 2. In *Bossier II,* the plaintiffs alleged that the redistricting plan illegally diluted the strength of minority voting by failing to adopt a plan that provided for any majority African-American districts. Therefore, the Court treated the case as a vote dilution case and, in that context, stated as follows:

> [A]ppellants object that our reading of § 5 would require the District Court or Attorney General to preclear proposed voting changes with a discriminatory effect or purpose, or even with both. That strikes appellants as an

> inconceivable prospect only because they refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context. It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilative than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.

Plaintiffs rely on the final two clauses of the last quoted sentence as authority for their claim that *Bossier II* holds that § 2 is broader than § 5. It is clear, however, that in *Bossier II* this Court was not making any general statement about the reach of § 2 as compared to the reach of § 5. Rather, the Court was only acknowledging the different purposes of the two VRA sections. Section 5 is an extraordinary burden-shifting mechanism triggered only by a history of voting discrimination and is intended to preemptively prohibit **changes** in election qualifications, standards, practices or procedures that worsen the status quo. Section 2, on the other hand, is the general mechanism for challenging vote dilution that occurs in the election or nomination of office holders, regardless of whether that alleged dilution is the result of a change in election qualifications, standards, practices or procedures or the result of a long-standing practice.

In other words, in *Bossier II* this Court was merely stating the obvious, given its previous decisions: a **vote dilution** case is within the scope of § 2 of the VRA whether or not a regressive statute was involved in the dilution. Contrary to Plaintiffs' arguments, in *Bossier II* this Court did not hold that § 2 was uniformly broader than § 5 of the VRA. Most importantly, the Court did not hold that **any** voting practice, standard or procedure within the purview of § 5 was necessarily within the purview of § 2. Nothing in *Bossier II*, therefore, undermines the holding of *Mixon* or the lower

courts' reliance on that decision to uphold the Michigan statute at issue here.

On the contrary, in the instant matter the Sixth Circuit fully and correctly analyzed the impact of *Bossier II* on the validity of the *Mixon* holding. *Moore v Detroit School Reform Bd,* 293 F 3d 352, 364-365 (6th Cir 2002). Adopting the reasoning laid out above, the Court below recognized the crucial distinction that *Bossier II* dealt only with Section 5 of the VRA and that it did not involve a challenge to an appointive system. *Id.* Quite simply, the Court below recognized that *Bossier II* is not a decision addressing whether § 2 extends to decisions to shift from elective to appointive systems. Moreover, the Court below further distinguished *Bossier II* on the basis that it "did not address the complete denial of the right to vote that the plaintiffs claim is implemented by [1999 PA 10]." *Id.* at 365. On this point, the Court quoted this Court's explanation in *Bossier II* that "our holding today does not extend to violations consisting of an outright 'denial of an individual's right to vote, as opposed to an 'abridgment' as in dilution cases." *Id.* (quoting *Bossier II,* 528 US at 338 n6). Thus, by this Court's express terms, *Bossier II* does not apply to either the *Mixon* case or the instant matter, as both involve claims challenging the complete denial of a right to vote for a public office.

Based on these vital differences between the issues and facts before this Court in *Bossier II* and the issues presented in *Mixon* and this matter, the Court below held that *Bossier II* is not applicable to the instant matter and that *Mixon* remains binding and good precedent in the Sixth Circuit. In sum, the Court held:

> The fact that a plaintiff who brings a vote-dilution claim can succeed under § 2 by demonstrating a discriminatory effect, even though a § 5 action would fail because of the lack of retrogression, is simply not relevant to whether § 2 applies to appointed offices in

> political subdivisions not subject to § 5. [293 F 3d at 365.]

In conclusion, the Court below appropriately considered this Court's decision in *Bossier II* and correctly concluded that it does not undermine the holding in *Mixon* that Section 2 does not provide a basis for challenging the change from an elective to an appointive system in a non-Section 5 jurisdiction. The decision below does not conflict with *Bossier II* and it reflects the unanimous views of the federal courts on this issue. Plaintiffs do not present an issue warranting this Court's review.

III. Based on the differing language and purposes of Sections 2 and 5, the fact that Section 2 does not provide a basis to challenge a non-Section 5 jurisdiction's decision to replace an elective system with an appointive system is not inconsistent with this Court's holding that similar changes made in a Section 5 jurisdiction are subject to preclearance and review.

Notwithstanding the absence of any support from the language, legislative history, purpose or jurisprudence of Section 2, Plaintiffs persist in complaining that the Court's decision below and in *Mixon* is inconsistent with this Court's holding that a change from an elective to an appointive system falls within § 5 of the Voting Rights Act. *Allen v State Bd. Of Elections, supra.* According to plaintiffs, § 2 and § 5 use identical language and it makes no sense to interpret one provision differently than the other.

Plaintiffs incorrectly assert that the language of Sections 2 and 5 are identical. Both sections refer to a "voting qualification or prerequisite to voting or standard, practice or procedure." With regard to § 5, however, **any** voting qualification, prerequisite, standard, practice or procedure that **differs** from one in effect as of a designated date triggers the preclearance requirement and a VRA challenge. By

comparison, under § 2, a voting qualification, prerequisite, standard, practice or procedure is only within the purview of the section if it denies or abridges the rights to vote **as provided in subsection b of the statute.** Subsection b speaks only of the **nomination and election of representatives.** There is quite simply no language in § 2 that is broad enough to reach a state's decisions as to which public offices should be elected and which should be appointed. And, as the Court noted in *Mixon,* there is no evidence that Congress intended that the language of § 2 be interpreted that broadly.

Section 2, therefore, does not cover everything that might fall within § 5. Furthermore, § 2 is not triggered merely by a change in state law, as implied by Plaintiffs and amici below. A state statute either violates § 2 or it does not, whether that statute is brand new or 100 years old, **but only if** that statute relates to the nomination and election of representatives.

Moreover, contrary to Plaintiffs' assertion, while § 2 and § 5 are complementary, they serve different purposes. Section 5 of the VRA is aimed at those jurisdictions that have a history of voting discrimination. Its purpose was to prevent those jurisdictions from continuously amending their law to avoid the effect of court decisions enforcing the right to vote. *Allen, supra.* Section 5 prescribes a process to review changes in state or local law prior to those changes becoming effective. Section 5 applies even to minor changes in the law and to changes in the law that may not be discriminatory. *Presley v Etowah County Commission,* 502 US 491, 112 S Ct 820, 117 L Ed2d 51 (1992). State laws can be subject to the preclearance procedures of § 5 even though those laws would not violate § 2. Conversely, state laws can pass muster under § 5 even though the laws might violate § 2. *Bossier II, supra.*

On the other hand, a mere change in state law does not automatically implicate § 2 of the Voting Rights Act. Section 2 can be, and often is, applicable to long-standing state statutes. Those statutes must, however, fall within the narrower scope of § 2 as defined by the language of that section.

The fact that Sections 2 and 5 do not have an identical scope of review is entirely consistent with, and necessary to, their different purposes. Most importantly, the differences in the reach of these sections of the VRA is necessary because the preclearance requirements of Section 5 represent an extraordinary encroachment into sovereign powers not justified in a non-Section 5 jurisdiction. It is only because Section 5 jurisdictions have an established history of discriminatory voting practices that the requirement that all changes in voting laws be precleared can be justified. To subject all decisions regarding restructuring public offices from elective to appointive offices to Voting Rights Act review without the predicate of a pernicious history of discriminatory voting practices would be inconsistent with fundamental principles of federalism, separation of powers and state sovereignty. Such restructuring decisions constitute essential governmental functions and reflect important policy determinations regarding what structure and method of governance best serves public interests. The Michigan Legislature's decision to replace elected school boards in qualifying districts reflects the choices of the democratically-elected representatives in this State regarding what is best for the state education system and Michigan's school children. Congress did not intend Section 2 to be used as a tool to encroach upon the power of Michigan's elected representatives to make such fundamental state sovereignty decision.

Plaintiffs' assertion that Section 2 must reach all the types of governmental action reviewed in Section 5 jurisdictions ignores the crucial differences in those two types of jurisdictions. If adopted, Plaintiffs' conception of Section 2's scope would do great violence to state sovereignty and thus was properly rejected by the Court below. The decision by the lower court is in conformity with this Court's VRA jurisprudence, the language and purposes of the VRA, and the other federal courts that have decided this issue. Plaintiffs have not presented an issue warranting review by this Court.

CONCLUSION

The District Court and the Sixth Circuit Court of Appeals properly upheld the validity of 1999 PA 10. The lower courts correctly held that Section 2 of the VRA does not provide review of a decision to shift from an elective to an appointive system for filling public office in a non-Section 5 jurisdiction. Such a decision is a fundamental power and responsibility of each sovereign state and goes to the core questions of how best to structure public offices to serve vital public interests. The lower court rulings are in conformity with the principles of state sovereignty, federalism, and separation of powers that are the bedrock of our democracy. The Plaintiffs' interpretation of Section 2 of the VRA poses great violence to those foregoing principles and would result in a devastating encroachment on the State of Michigan's self-governance. Respondent Governor John Engler, State of Michigan, respectfully submits that Plaintiffs do not present an issue warranting this Court's review and requests that the Court deny this petition for writ of certiorari.

Respectfully submitted

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No. 02-711

IN THE

Supreme Court of the United States

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Petitioners,

v.

DETROIT SCHOOL REFORM BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF ROSA L. PARKS; THE DETROIT CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCALS 207, 312, AND 345; THE UNITED AUTOMOBILE WORKERS, LOCAL 6000; THE MICHIGAN COALITION FOR HUMAN RIGHTS; AND THE CENTER FOR CONSTITUTIONAL RIGHTS, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the rules of this Court, Rosa L. Parks; The Detroit Chapter Of The National Association For The Advancement Of Colored People (NAACP); The American Federation Of State, County, And Municipal Employees, Locals 207, 312, And 345; The United Automobile Workers,

Local 6000; And The Michigan Coalition For Human Rights, in support of Petitioners respectfully move for leave to file the attached Brief as Amici Curiae in support of the Petition for Writ of Certiorari. The Petitioners have consented to the filing of this Brief, as has the respondent Governor John Engler. Their Certificates of Consent have been filed with the Clerk of the Court. Counsel for the remaining respondents have declined to consent, thereby necessitating the filing of this Motion. The proposed amici each have a substantial interest in the outcome of this case.

Rosa L. Parks is the Mother of the modern civil rights movement and fought for voting rights for over 60 years. Her first attempts to vote took place in Alabama in 1940. She is the co-founder of the Rosa and Raymond Parks Institute for Self-Development, which motivates young people to reach and strive for their highest potential. She is presently a registered voter in Detroit, Michigan, and desires to campaign and vote for the candidates of her choice for Detroit School Board.

The Detroit NAACP is a branch of the oldest and largest civil rights organization in the nation and in the City of Detroit, and has championed voting rights for African-Americans for over 90 years. The Detroit branch has tens of thousands of members who are registered Detroit voters who desire to campaign and vote for candidates for School Board.

The Michigan Education Association (MEA) is an organization of teachers and educational support personnel with over 150,000 members employed in public schools and institutions of higher education throughout the State of Michigan. The MEA strongly supports local control of public education.

AFSCME Local 207 is a labor organization representing approximately 1300 employees in the Detroit Water and Sewerage, and Public Lighting Departments. AFSCME Local 312 is a labor organization representing approximately 500 employees in the Detroit Department of Transportation.

AFSCME Local 345 is a labor organization representing approximately 1100 custodial, maintenance, and other employees of the Detroit Board of Education. The overwhelming majority of these union members are registered Detroit voters who desire to campaign and vote for School Board.

UAW Local 6000 is a labor organization representing 20,000 classified employees of the State of Michigan. Several thousand of its members are registered Detroit voters who desire to campaign and vote for School Board.

The Michigan Coalition for Human Rights is a voluntary, unincorporated non-profit association composed of representatives from religious, civil rights and labor organizations, dedicated to the protection of civil rights both in the United States and abroad, with a particular emphasis on racial discrimination. Many members are registered Detroit voters.

The Center for Constitutional Rights is a national, non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has a longstanding history of fighting to defend the voting rights of African Americans throughout the United States, *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States of Turner*, No. 85-00014 (S.D. Ala. 1985), and has fought to improve minority school districts through both litigation challenging de facto segregation, *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967) (also challenging appointment of school board in District of Columbia), and activism encouraging local community control of school districts in disadvantaged neighborhoods (such as Ocean Hill-Brownsville) in New York City and elsewhere.

Rosa L. Parks, and the Civil Rights and Labor Organizations which have endorsed the attached Brief have either personally lost the right to vote for Detroit School Board as a

result of the complained of actions of the State of Michigan, or many or hundreds or thousands of their members have lost the right to vote for School Board. The proposed *Amici*, are particularly concerned about the manner in which Michigan has used the geographical boundary of the City of Detroit as a way to obscure the reality of the racially disparate impact of the legislation in question. By taking the right to vote for School Board away from only voters who live in the City of Detroit, the State of Michigan has disenfranchised over 60% of the State's African-American population while disenfranchising only 4% of Michigan's non-African American population.

The Michigan Legislation by depriving Detroit voters alone of all the population of Michigan of the right to vote for School Board, has left such voters, predominantly African-Americans, with no effective ability to influence School Board decision making, and has consigned a majority of Michigan's African-American citizens to a degrading form of second-class citizenship. This attempt to limit popular sovereignty has resulted in the majority of Michigan's African-American population being stigmatized by the demeaning denial of a right enjoyed by every other registered voter in Michigan.

Regardless of the intent of the Michigan Legislature, to deny the right to vote in a way that has an overwhelmingly discriminatory impact upon African-American Citizens deprives those citizens of the most fundamental right precisely in a way that the 1965 Voting Rights was intended to prevent. Amici are filing this Brief because of their interest in seeking vigorous enforcement of the 1965 Voting Rights Act, which was intended by Congress to prevent any State from doing what Michigan has done.

For the foregoing reasons, Rosa L. Parks; The Detroit Chapter Of The National Association For The Advancement Of Colored People (NAACP); The American Federation Of

State, County, And Municipal Employees, Locals 207, 312, And 345; The United Automobile Workers, Local 6000; The Michigan Coalition For Human Rights and the Center for Constitutional Rights respectfully request that they be allowed to participate in this case by filing the attached Brief.

Respectfully submitted,

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December 9, 2002

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STATEMENT OF STANDING

Pursuant to Rule 37, Certificates of Consent to the filing of this brief *amici curiae* from the Petitioners and Respondent Governor John Engler have been filed with the Clerk of the Court. The other Respondents have not consented, and a motion has been filed for leave to file this Brief.[1]

[1] Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person or entity other than the *amici curiae*, their members and counsel, have made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE*

The proposed *amici* each have a substantial interest in the outcome of this case.

Rosa L. Parks is the Mother of the modern civil rights movement and fought for voting rights for over 60 years. Her first attempts to vote took place in Alabama in 1940. She is the co-founder of the Rosa and Raymond Parks Institute for Self-Development, which motivates young people to reach and strive for their highest potential. She is presently a registered voter in Detroit, Michigan, and desires to campaign and vote for the candidates of her choice for Detroit School Board.

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registered Detroit voters who desire to campaign and vote for School Board.

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INTRODUCTION

Amici submit this brief in support of Petitioners, and agree that Michigan 1999 Public Act 10 ("PA10"), codified as MCLA 308.371-308.471a, violates Section 2 of the 1965 Federal Voting Rights Act, as amended, 42 USC 1973(a), (b)("Sec. 2").

The current PA 10 Detroit School "Reform"[2] Board was appointed amid grandiose, well publicized promises to lower class size, raise test scores, reduce the student drop-out rate, ensure timely delivery of textbooks and school supplies to classrooms, rebuild the physical plant, and implement other reforms. While many citizens believed that reform was never the real intent of the Act, the passage of time has demonstrated that the appointed School Board has not only failed to accomplish these claimed objectives, but currently presides over a public school system in a state of precipitous decline. Standardized test scores have declined dramatically (*See Amici* Apps. A and B, Detroit Public Schools Annual Report, 2001-2002, at 16-17, and Detroit Public Schools Website, MEAP scores for Winter 2002, at 1-3). Overall enrollment has dropped by over 10,000 students since the PA 10 School Board took office, resulting in a loss of over $71 million per year (*Amici* App. C, Jodi S. Cohen, *The Detroit News*, 11/21/2002). The number of high school students enrolled in 10th grade has decreased, indicating the drop-out rate has not been stemmed (*Id.*). Individual class size, however, is increasing (*Id.*). But the question before this Court is not school reform versus voting rights—it is a question of who will judge whether real school reform is occurring.

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[2] Although Michigan entitled PA10: "Appointment of School Reform Boards," nothing in PA10 "reforms" public education in any way. PA10 fails to provide any performance standards, benchmarks, or incentives to lower class size; raise standardized test scores; timely deliver textbooks and supplies to the classrooms; improve educational programs; renovate or replace buildings; improve administrative efficiency; or demonstrate fiscal responsibility. PA10 provides no funding for educational, structural, or staffing improvements. Most crucially, PA10 provides no mechanism for parents, teachers or voters to oversee the decision-making process. Thus, this is not really school reform legislation, and the official title of PA10 is a misnomer.

Throughout Michigan's history—and everywhere in the state today, save Detroit—the local citizens have determined whether the incumbent school officials are properly administering the education of their children. Until PA 10, all Michigan citizens had the power to change local school policies through school board election campaigns, by voting, or by re-calling unsatisfactory school board members from office. Of the total population of Michigan, only Detroit voters are, or ever will be, deprived by PA 10 of the power to effectuate changes in unsatisfactory public school policies. Since 60% of Michigan's African-American population, but only 4% of Michigan's non-African-American population resides in Detroit, the impact of PA 10 is overwhelmingly to disenfranchise African-American voters.[3]

Further, the earliest opportunity Detroit citizens will have to express an opinion on the appointed school board's performance will be the November, 2004 election. MCLA 380.375(2). Even then, citizens will only be allowed to vote "yes" or "no" to continue the appointed board. If "yes" prevails, citizens cannot vote again for another five years. If "no" prevails, then new school board elections will be scheduled. MCLA 380.376(5)(a). The earliest that new board members could take office would be July 1, 2005—six years after the takeover began. MCLA 380.375(5)(b).

As Detroit is the largest U.S. city with a majority African-American population, the national commitment to equality—as exemplified by U.S. Const. Ams. XIII, XIV, XV, the Reconstruction-era Civil Rights statutes, the Civil Rights Acts of 1960, 1964, and 1968, and the 1965 Voting Rights Act—

---

[3] Michigan's total 1990 population was 9,295,297. The 1,291,706 African-Americans constituted 13.9% of Michigan's 1990 population. Detroit's 1990 population of 777,916 African-Americans constituted 75.67% of Detroit's total population, and 60.22% of Michigan's total African-American population. Only 4% of Michigan's 1990 non-African-American population lived in Detroit. U.S. Census Bureau; 1990 Census.

have special meaning in Detroit—and PA 10 is a stinging affront to African American voters.

In February 2002, after the current "Reform" Board announced cutbacks and layoffs of school personnel, thousands of school employees, parents, and children protested outside the PA 10 School Board meeting. Hundreds attended the meeting; the noise was so loud the meeting could not take place (*Amici* App. D, Jodi S. Cohen and Hawke Fracassa, *The Detroit News*, 2/21/02). This occurrence, while unfortunate, is the logical outcome when citizens are deprived of lawful recourse by having the right to campaign for, vote for, and recall members of the local school board stripped away from them. The sting of such disenfranchisement is especially keen when the disenfranchisement has such a disparate racial impact.

In passing PA 10, its supporters claimed it was an act of a benevolent and paternalistic state government seeking to rescue the African-American youths of Detroit from the former incompetent and corrupt elected School Board. The opponents of PA 10, on the other hand, view PA 10 as a naked grab for power, the power to control the spending of the $1.5 billion annual budget of the Detroit Public Schools and the $1.3 billion in bonding authority for improvement of the physical plant of the Detroit Public School system which was available when PA 10 was enacted. (JA, 792-793) ("JA" refers to the Joint Appendix filed in the Court of Appeals). But the issue before the Court is not the intent or the educational results of this legislation—it is its overwhelming disparate impact upon the voting rights of African-American citizens.

At stake is not the question of whether a state generally has the power to change elected School Board positions to appointed School Board positions. This litigation presents the stark question as to whether a state can lawfully implement a change from elected School Boards to appointed

School Boards in a manner that disproportionately disenfranchises African-American voters.

No governmental body is more important to any community than its public school system. By enacting PA 10, overwhelmingly white suburban and rural Michigan State Legislators consigned 60% of Michigan's African-American population to the status of second-class citizens. The 1965 Voting Rights Act exists precisely to prevent minority population groups from being trampled on by the majority. This is the issue in this lawsuit. PA10 is an unlawful act and the court should grant the writ and so hold.

REASONS FOR GRANTING THE WRIT:

I. MICHIGAN VIOLATED THE 1965 VOTING RIGHTS ACT WHEN IT REVOKED THE HISTORIC RIGHT OF THE VOTERS OF THE STATE'S LARGEST SCHOOL DISTRICT, CONTAINING 60% OF THE STATE'S AFRICAN-AMERICAN POPULATION, TO ELECT SCHOOL BOARD MEMBERS.

A. The Right to Vote is the Most Fundamental of All Rights.

Michigan has infringed both major policies that are the foundation of the right to vote.

First, PA10 has left Detroit voters with no effective ability to influence school board decision-making. As articulated in *Wesberry v Sanders*, 376 US 1,17-18(1964):

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Secondly, by denying to 60% of Michigan's African-American citizens the right to vote for offices for which 96% of Michigan's non-African-American citizens are permitted to vote, Michigan has consigned the majority of Michigan's African-American citizens to a degrading form of second-class citizenship. As *Reynolds* v *Sims*, 123 US 533,567(1964) proclaimed: "To the extent that a citizen's right to vote is debased, he is that much less a citizen."

This Court has often acted to prevent efforts such as PA10 to limit popular sovereignty, and to prevent racial minorities from being stigmatized by the demeaning denial of rights enjoyed by majority citizens. As this court has long held, the right to vote is the most fundamental of all rights "because [it is] preservative of all rights," *YickWo* v *Hopkins*, 118 US 356, 370 (1886), and any abridgment of the right to vote must survive strict scrutiny. *Harper* v *Virginia Board of Elections*, 383 US 663,670(1966); Accord, *Reynolds, supra*, at 554, 561-62.

Even though the right to vote for school board is not considered fundamental in a constitutional sense, *Sailors v. Kent Bd of Educ,* 387 U.S. 105 (1967), to deny the right to vote in a way that has an overwhelmingly discriminatory impact denies African American citizens of the most fundamental right in a way that the voting rights act was intended to prevent.

B. The Right of African-Americans To Vote Cannot Be Diminished By Using Geographic Or Other Criteria That Have A Racially Disparate Impact.

While the Michigan Legislature denied the right to vote based not on race but on the alleged size of the city, this court has repeatedly held that geographic lines or other criteria cannot be used to deny voting rights in a way that discriminates against African-American citizens.

Most famously, in *Gomillion* v *Lightfoot*, 364 US 339, 342-346(1960), Alabama redrew the boundaries of Tuskegee so that all but a small minority of black residents were rezoned outside the city limits. However, this court held that Alabama could not use this device to revoke the right of African-Americans to vote in Tuskegee elections:

> "The . . . conclusion . . . urged upon us by [Alabama], would sanction the achievement by a State of any impairment of voting rights . . . [because of race] whatever so long as it was *cloaked in the garb of the realignment of political subdivisions*. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' *Frost and Frost Trucking Co.* v *Railroad Commission of California*, 271 US 583 (1926). . . .
>
> The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.(emphasis added).

Similarly, in *Gray* v *Sanders*, 372 US 368, 380, 381 (1963), this court held that the states cannot deny the right to vote based on criteria such as home site or occupation:

> The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . . and, as previously noted, there is no indication in the Constitution that home site or occupation affords a permissible basis for distinguishing between qualified voters within the State . . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth

> Amendments can mean only one thing—one person, one vote." *Gray, supra*,at 381(emphasis added). Cf. *Evans* v *Cornman,* 398 US 419, 422 (1970)

While the Legislature did not identify Detroit by name in PA 10, it is abundantly clear that the Act was intended to target only Detroit. The Legislature's disingenuous attempt to camouflage its true intent that PA 10 only apply to Detroit by amending the statute after this action was filed to change "the qualifying district" to "a qualifying district" is transparently misleading. As noted in the 6th Circuit Opinion below, Detroit is the only school system in Michigan with over 100,000 students; the second largest system, Grand Rapids, has only 27,000 students. (Pls.. App. at 2a) Detroit is not just the only school district that presently meets the PA 10 criteria; it is the only school system that will ever meet the criteria. Michigan's geographical boundaries are now set. There is no other city in Michigan that has within it sufficient undeveloped area to permit the massive population expansion that would be necessary to generate a school system of over 100,000 students.

PA 10 disenfranchises 60% of the Michigan African-American population by revoking voting rights in the major geographical area where the state's African-American population is concentrated. If PA 10 is upheld, state legislatures will be able to effectively disenfranchise most African-Americans voters by singling out districts where concentrations of African-Americans reside. Because residential housing patterns are much more racially segregated in the North than in the South, this can more readily be applied in Northern states, where the special protections of Section 5 of the Voting Rights Act do not apply. Thus, denying the right to vote to Detroit, which is widely considered to have the most racially segregated housing patterns in the nation, automatically disenfranchises more than half of the State's African-American population.

Indeed, if the Michigan legislature were to lower the school population size restriction of PA 10 to include just five more districts, almost 75% of Michigan African-Americans would be deprived of the right to vote for school board.[4] While the numbers may vary slightly, there are many other states where a Legislature could disenfranchise a large majority of the African-American voting population by disenfranchising the voters of a few geographic districts.

The District Court's Opinion below shows how easy it would be to discriminate in numerous States, North and South. By claiming that urban public school systems are in "deep distress" (Pls. App.46a), resulting in a need to "fundamentally restructure" educational systems in urban area (Pls. App. at 45a); or by claiming that more densely populated urban areas "present problems of governmental management and control different in kind, quality and magnitude" from less densely populated areas (Pls. App. 60a); or even by claiming that the state needs the "freedom to experiment with different techniques to advance public education" in urban areas (Pls.. App., 68a), the states will be free to consign African-American citizens to second-class citizenship. With such soothing words, the States would be free to deny African-American citizens of the franchise stigmatizing them as unable to elect representatives who are capable of solving the problems facing large, urban educational systems. Such attempts to implement public policy through abridgement of the right to vote place our society on a "slippery slope" to a type of government that we had hoped had been left behind forever.

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[4] In 1990, the City of Flint had 67,500 African-Americans; Grand Rapids had 35,000; Pontiac had 30,000; Saginaw had 28,000; and Lansing 22,000; totaling, with Detroit, 960,500 African-Americans, representing 74.4% of Michigan's 1990 total of 1,291,700 African-Americans. U.S. Census Bureau; 1990 Census.

PA 10 strips Detroit voters of the power to decide what types of reform are best suited to their public school system and whether such reforms are accomplishing their stated purposes. By this Act, the state legislature has taken this basic decision-making power from the voters of Detroit, while leaving it in local hands in the rest of the state. Further, the voters of Detroit have no recourse: their elected senators and representatives in the state legislature overwhelmingly voted against PA 10, and Detroit's voters have no ability to remove from office the overwhelmingly white, rural and suburban legislators who passed PA 10 over the objections of Detroit legislators. PA 10 is thus a classic example of the "tyranny of the majority over the minority." Section 2 outlaws such tyranny, when used to disproportionately deprive African-American citizens of the right to vote.

C. The 1965 Voting Rights Act prevents the disenfranchisement of the African-American voting population even when done with a supposedly "benevolent intent."

The rise of the modern civil rights movement in the 1940s and 1950s provided the impetus for Congress to address racial discrimination in voting, culminating in the 1965 Voting Rights Act. *Chisom* v *Roemer*, 501 US 380,403-404(1991) summarized the development and purpose of the Act:

> "Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.' *South Carolina* v *Katzenbach*, 383 US 301,315(1966). In *Allen* v *State Board of Elections*, 393 US 544,567(1969), we said that the Act *should be interpreted in a manner that provides 'the broadest scope' in combating racial discrimination.* Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of this Court had concluded that the

> original Act, like the Fifteenth Amendment, contained such a requirement. *See Mobile* v *Bolden*, 446 US 55(1980). Thus, Congress made clear that a violation of [Sec.] 2 could be established *by proof of discriminatory results alone* [emphasis supplied].

The1982 amendments strengthened the Voting Rights Act by clearly declaring the Congressional intent that it is unnecessary to prove intentional racial discrimination to establish a violation. The 1982 amendments were a clear message to the federal courts to strengthen efforts to root out racially discriminatory voting practices. Section 2 now provides:

> "No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision *in a manner which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 USC 1973(a)(Emphasis supplied).

Further, Congress redefined a violation of Section 2 to include a showing that members of a protected group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 USC 1973(b). *Thornburg* v *Gingles*, 478 US 30, 35 (1986) recognized the significance of this change in holding that, under revised section 2, "a violation could be proved by showing discriminatory effect alone," and held that Congress had clearly intended to establish a "results test."

As a result of the 1982 amendments, the focus of a Section 2 challenge to a change in voting practices has now shifted dramatically from the subjective intentions of the government entity in question, to the impact that the new voting procedures have on the political influence of the affected group. The 1982 Amendments were hailed across the political

spectrum as a major step forward in the campaign to root out all vestiges of racial discrimination in voting rights. As stated by former President Ronald Reagan:

> *The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.* Statement of Former President Ronald Reagan, while signing into law The Voting Rights Act Amendments, HR Rep No. 3112, 18 Weekly Comp.Pres.Doc. 84d6 (June 29, 1982) as quoted in Comment, *Vote Dilution, Discriminatory Result, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section II of the Voting Rights Act?*, 32 UCLALR 1203, n.1 (1985) (emphasis supplied).

PA10 has an unlawful disparate impact upon African-American citizenry whether or not the Michigan legislature's intent was discriminatory. What is determinative in this case is the racially disparate *impact* of the decision to revoke the right to vote for school board from 60% of Michigan's African-American citizens, while leaving that right intact for 96% of Michigan's non-African-American citizens. The racially disparate impact of PA10 establishes a clear Section 2 violation, regardless of Michigan's intent.

D. The Judgments Below Fail to Enforce the Congressional Intent Underlying the Voting Rights Act.

Both the 6th Circuit and the District Court Opinions below are based upon a misreading of *Chisom supra* (Pls. App. 19a; 63a). *Chisom* certainly does not suggest that a state can, consistent with Section 2, single out predominantly African-American districts within its boundaries and disenfranchise only the voters in those districts. *Chisom, supra*, simply notes, at 401: "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Acts by changing to a system in which judges are appointed, and in

that way, it could enable its judges to be indifferent to public opinion." This only means a state is free to change an entire state system from elective to appointive without violating the Voting Rights Act. Indeed, such a change would be permissible so long as not made with a racially discriminatory motive.

Section 2, however, clearly forbids states from changing from an elective process to an appointive process where the change has the effect of disproportionately disenfranchising African-Americans. For example, *Chisom, supra*, at 403, states:

> In *Allen* v. *State Board of Elections,* 393 US 544, 567 (1969), we said that the Act should be interpreted in a manner that provides *"the broadest possible scope" in combating racial discrimination.* (Emphasis added).

In *Allen, supra*, one of three Mississippi statutes challenged under Sec. 5 of the Voting Rights Act *changed the office of county superintendent of education in certain counties from elective to appointive.* Acting under Section 5, which requires certain jurisdictions with a history of racial discrimination in voting to obtain advance approval from the U.S. Department of Justice before implementing certain changes in voting practices, *Allen* held that such a decision had to be submitted for advance approval because: "The power of a citizen's vote is affected by this amendment if, after the change, he is prohibited from electing an officer formerly subject to approval of the voters." *Allen, supra*, at 19.

The District Court below thought *Allen* inapplicable because Section 5 does not apply in Michigan. (Pls. App. 64a). However, *Chisom, supra*, notes, at 401, that the "close connection between Sections 2 and 5" undermines the view that a change that must be submitted for pre-clearance under Section 5 is somehow exempt from challenge under Section 2

in non-Section 5 states. It would be unexplainably anomalous if a discriminatory practice prohibited from implementation in a state subject to Section 5 could not be challenged under Section 2 in a non-Section 5 state. Thus, *Chisom* and *Allen* both support the proposition that Section 2 prohibits a state from changing from an elective to an appointive system only in geographical locations where the African-American population is concentrated.

Further, neither the case followed by the 6th Circuit below, *Mixon* v *Ohio*, 193 F3d 389 (6th Cir 1999), nor the cases cited therein, support the proposition that a state can selectively revoke the voting franchise only from geographic areas with high concentrations of African-American voters. *Mixon* concerned a public school system which the state took over to prevent imminent fiscal and administrative collapse. *Id*, at 394-396. Even if *Mixon* is correct that the Voting Rights Act does not prevent the temporary implementation of an appointed school board to prevent a school system from relapsing into complete fiscal and administrative collapse, this is a far cry from the position that a state can for years revoke the right to vote only in areas where the population of African-Americans is concentrated, and where the Detroit public school system, for all its widely-publicized problems, was nowhere near a state of complete fiscal and administrative collapse.

The 6th Circuit below also cited *Mixon*, *supra*, at 408, for the proposition that "Section 2 of the Voting Rights Act does not apply to appointive offices." (Pls.. App. 19a). This is irrelevant: While Section 2 does not apply to systems that are historically appointive, *Allen*, *supra*, holds that it does apply to changes in voting systems where the change will have a racially disparate impact on African-American voting rights. None of the cases cited in *Mixon*, *supra,* at 407, support the proposition that Section 2 may not be used to challenge the replacement of an historically elective process with a newly

imposed appointive process. In fact, none of them even address that issue. Instead, the cases cited mostly found Section 2 not applicable where citizens challenged historically appointive systems and sought to impose a new elective system.

Subsequent to *Mixon, supra*, this Court issued its decision in *Reno* v *Bossier Parish School Board II*, 528 U.S. 320, 120 S.Ct.866 (2000). By definition, Section 5 pre-clearance proceedings deal only with changes from the status quo. Section 2 proceedings, however, while most commonly involving challenges to the status quo, can also encompass challenges to changes in the status quo. This Court made it clear that in states covered by Section 5, if a proposed change receives pre-clearance and is then enacted, that change is still subject to a later Section 2 challenge:

> Pre-clearance "does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of Section 5, but must be attacked through the normal means of a Section 2 action." *Id.*, 120 S.Ct., at 875.

Michigan's change from an historically elective process for selection of local school board members to an appointive process imposed exclusively on the predominantly African-American population of Detroit is not just a dilutive change in voting strength; it is the total disenfranchisement of one segment of Michigan's electorate. If Michigan was a Section 5 state, PA 10 would clearly be subject to pre-clearance scrutiny. *Allen, supra. Bossier Parish II, supra*, makes it clear that whether or not a state is subject to Section 5, a significant change in election procedures which disparately impacts the right of African-Americans to vote is illegal under Section 2.

Voting is a pivotal social practice that defines full membership in this society. Historically, racial discrimination in voting has been a stinging affront to African-Americans, symbolizing and exemplifying segregation and exclusion from the American political process. The Michigan legislative majority, by revoking the right of Detroit residents alone to vote for school board, has stigmatized 60% of Michigan's African-American population with a demeaning exclusion from the political life of the state. But Section 2 makes it illegal to create a group of second-class citizens, by taking away, restricting, or diluting the right to vote.

The Voting Rights Act is a congressional declaration of a national policy of the highest priority to eliminate racial discrimination in the exercise of the voting franchise. This Act is the strongest official government policy declaring an end to centuries of enslavement, discrimination, segregation and despair. The right to vote is essential to the abolition of racial discrimination and to our advance to a society where equal rights are a reality and not just a slogan. The possession of the right to vote empowers citizens to change the basic political conditions of their existence and signals the possessor of that right as a full member of society. As noted by Justice Jackson in *Railway Express Agency* v *New York*, 336 US 106, 112 (1940) (Jackson, J., concurring): "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."

For the above reasons, the Opinion of the Court of Appeals that the appointed school board imposed upon the citizens of Detroit does not violate Section 2 is without merit. PA 10 has summarily imposed upon Detroit voters, including 60% of Michigan's African-American population, a protected class, an appointed school board, and denied Detroit voters the right to elect school board members for a minimum of five years.

At the same time, the rest of the registered voters in the state, including 96% of Michigan's non-African-American population, retain their historic right to elect their own school board. If this decision is allowed to stand, it will sanction both present, and future, violations of Section 2. This Court should grant the Writ so that it can reverse the Opinion of the Court of Appeals and strike down PA10 as clearly violative of Section 2 of the 1965 Voting Rights Act.

CONCLUSION

WHEREFORE, for these reasons, *Amici* request that the Petition for a Writ of Certiorari be granted, and the Opinion of the Court of Appeals for the 6th Circuit upholding the Order of the District Court granting Defendants' Motion for Summary Judgment be reversed, and this case be remanded for entry of Judgment for the Plaintiffs.

Respectfully submitted,

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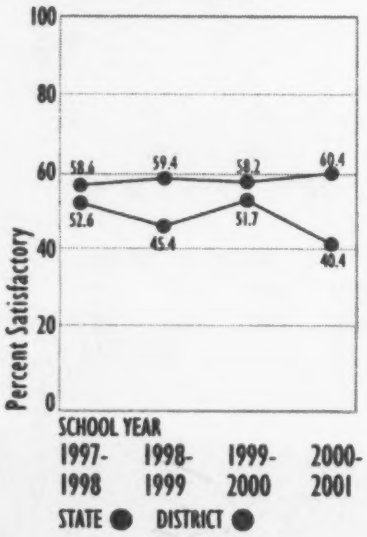
December 9, 2002

Michigan Educational Assessment Program (MEAP)

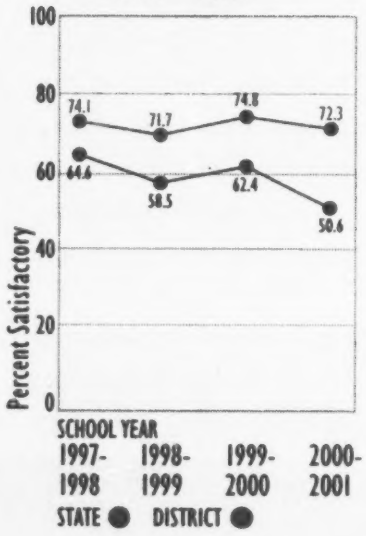
MEAP scores in general significantly varied from school to school. Analysis of MEAP performance indicates that several factors may have influenced the decline:

The State of Michigan implemented new and more stringent accreditation standards related to student MEAP scores during the 2000-2001 school year.

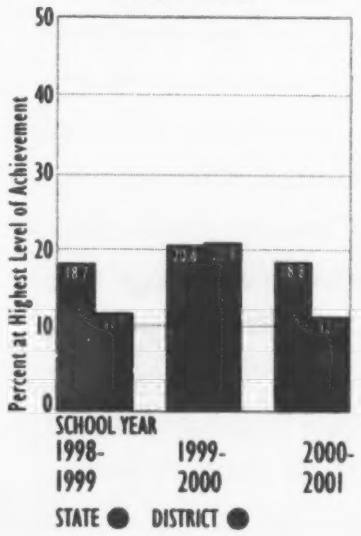
Grade 4 Reading 1997 - 2001



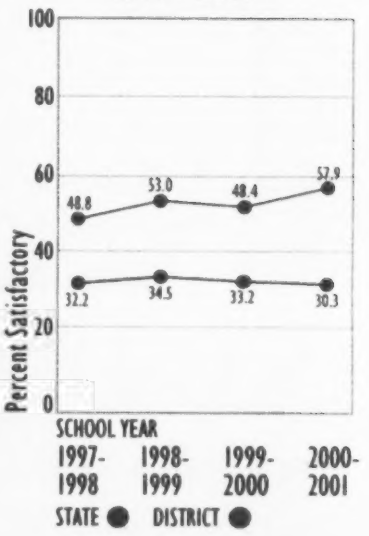
Grade 4 Mathematics 1997 - 2001



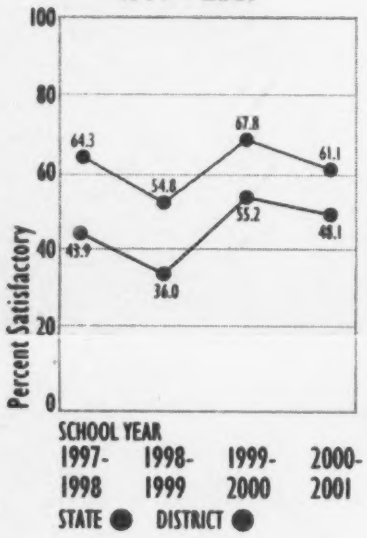
Grade 5 Social Studies 1998 - 2001



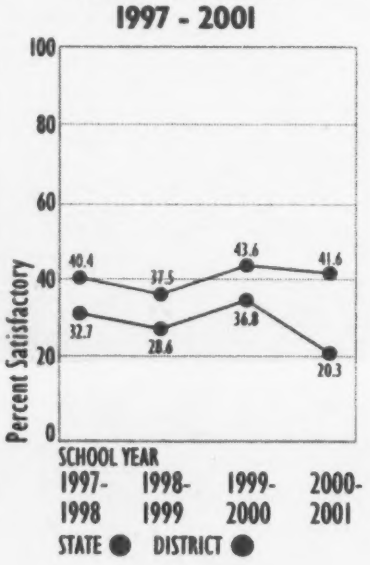
Grade 7 Reading 1997 - 2001



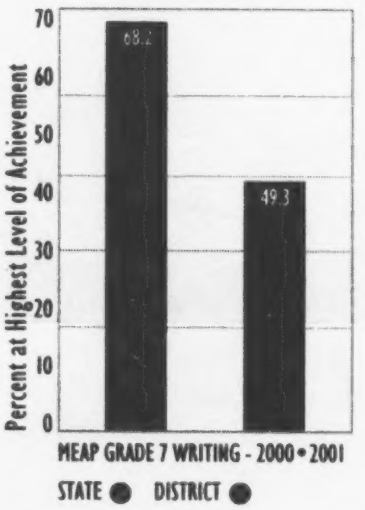
Grade 5 Writing 1997 - 2001



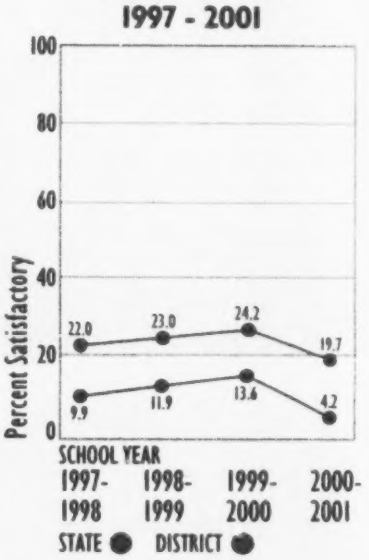
Grade 5 Science 1997 - 2001



Grade 7 Writing 2000 - 2001

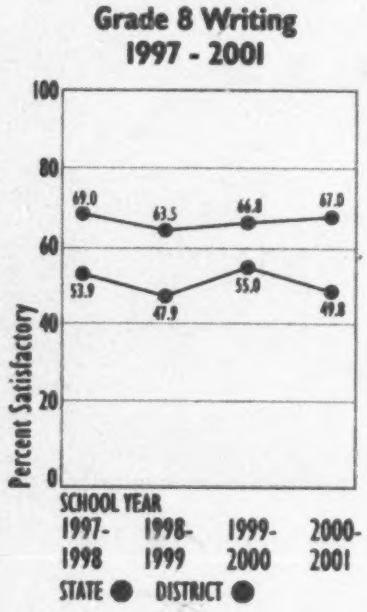


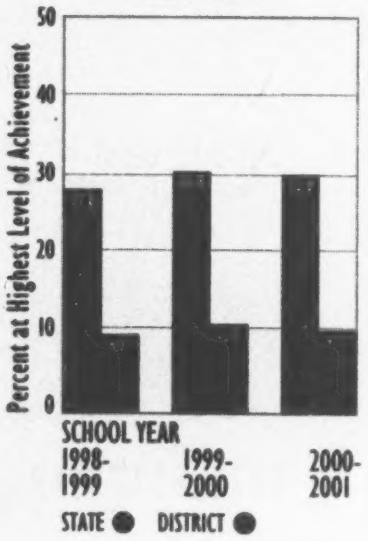
Grade 8 Science 1997 - 2001



The changes resulted in more than 600 state schools (one in five) falling below the standard.

Detroit Public Schools underwent significant administrative changes in the past few years. More than 80 new principals were hired during the 2000-2001 school year and 1,000 new teachers were hired from 1999-2001. Additionally, during 1999-2000, 259 non-certified instructional personnel were used to teach in critical areas such as math, science, reading and writing.





Dr. Richard A. Boyd, former Superintendent of Cleveland Public Schools, Dr. Anthony Bryk, Principal Investigator of the Consortium for Chicago Schools Research and Dr. Lawrence Lezotte, a national expert on Effective Schools have each indicated that large scale and rapid changes occurring in school reform may have the effect of disrupting a school system initially. Nonetheless, the positive effects of strong leadership are worth short-term consequences.

Although District-wide MEAP scores generally declined in 2001, dozens of Detroit Public Schools were among the top performers on the exam.

Seventy-five percent of students at the following schools demonstrated state-level proficiency on the MEAP in reading, writing, math and science over the past two years.

Bates Academy
Brady Elementary School
Beard Elementary School
Bunche Elementary School
Chrysler Elementary School
Davison Elementary School
Detroit Academy for Science, Math & Technology
Dixon Elementary School
Dow Elementary School
Fairbanks Elementary School
Fine & Performing Arts High School
Fisher Middle School
Foreign Language Immersion and Cultural Studies
Gompers Elementary School
Harms Elementary School
Healy International Academy
Henderson International Institute
Ludington Magnet Middle School
Malcolm X Academy
Mann Elementary School
Mark Twain Elementary School
Robeson Academy
Thirkell Elementary School
Spain Elementary/Middle School

APPENDIX B

DETROIT PUBLIC SCHOOLS 2002 MEAP SCORES;
Michigan Department of Education

micms-cluster.state.mi.us/mischoolinfo/

Class of 2002: Grade 4		
	Math	Reading
Satisfactory	Not Applicable	33.2%
Moderate	Not Applicable	27.7%
Low	Not Applicable	39.2%
Level 1: Exceeded MI Standards	13.9%	Not Applicable
Level 2: Met MI Standards	32.2%	Not Applicable
Level 3: At Basic Level	31.3%	Not Applicable
Level 4: Apprentice	22.6%	Not Applicable
Number Included	13798	13399
Number Tested	13801	13869
Note:	* = Fewer than 10 students included.	

Class of 2002: Grade 5			
	Science	Social Studies	Writing
Proficient	Not	Not	39.1%

	Applicable	Applicable	
Not Yet Proficient	Not Applicable	Not Applicable	60.9%
Level 1: Exceeded MI Standards	10.9%	1.6%	Not Applicable
Level 2: Met MI Standards	36.1%	10%	Not Applicable
Level 3: At Basic Level	38.6%	19.1%	Not Applicable
Level 4: Apprentice	14.4%	69.3%	Not Applicable
Number Included	13882	13344	13261
Number Tested	13885	13820	13695
Note:	* = Fewer than 10 students included.		

Class of 2002: Grade 7		
	Writing	Reading
Satisfactory	Not Applicable	21.7%
Moderate	Not Applicable	29.9%
Low	Not Applicable	48.4%
Proficient	48.9%	Not Applicable

Not Yet Proficient	51.1%	Not Applicable
Number Included	11080	11536
Number Tested	11446	11930
Note:	* = Fewer than 10 students included.	

Class of 2002: Grade 8			
	Science	Social Studies	Math
Level 1: Exceeded MI Standards	2.3%	2.1%	6.6%
Level 2: Met MI Standards	30.6%	9.1%	13.4%
Level 3: At Basic Level	33.7%	20.8%	25.9%
Level 4: Apprentice	33.3%	67.9%	54.1%
Number Included	10295	10008	10313
Number Tested	10295	10301	10313
Note:	* = Fewer than 10 students included.		

Class of 2002:					
	Math	Reading	Science	Social Studies	Writing
Level 1: Endorsed Exceeded MI Standards	212	378	31	1	55
Level 2: Endorsed Met MI Standards	1662	2433	992	251	2231
Level 3: Endorsed At Basic Level	1289	1098	1580	1312	1863
Level 4: Not Endorsed	2933	2029	3203	4143	1205
Not Tested	379	439	416	533	743
Parent Exempt	1	2	2	1	2
Note:	High school scores are number of students, not percentages.				

APPENDIX C

Detroit schools lose kids, millions

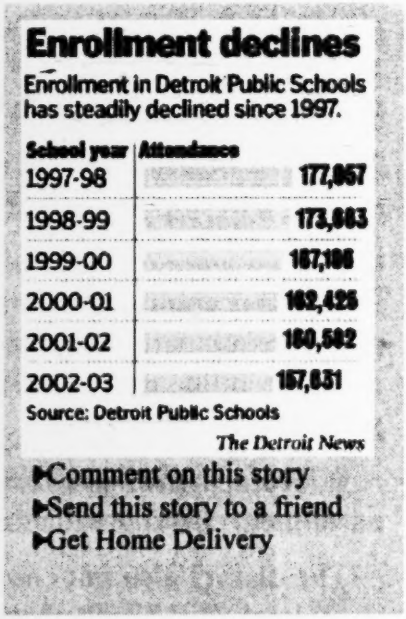
Exodus of 3,000 students will cost strapped district more than $21 million in state aid

November 21, 2002

By Jodi S. Cohen / *The Detroit News*

DETROIT—Despite massive efforts during the past year to stop a "death spiral" of declining enrollment, Detroit Public Schools lost another 3,000 students this fall.

The decline, which is outpacing Detroit's population losses, will cost the district about $21 million in state aid and will likely prompt mid-year budget cuts that could hamper reform efforts, officials told The Detroit News.



In addition, school district chief executive Kenneth Burnley said his staff will investigate why efforts to stop the decline—including a marketing campaign and new academic programs—were not successful. Enrollment sank to 157,631 kindergarten through high school students.

"We will have some loss of resources and some challenges," said Burnley, who has made student enrollment a top priority. "If you don't have the students, you can't make it work."

Indeed, Burnley often refers to the loss of students as a death spiral, resulting in decreased funding followed by cuts in staff, supplies and other resources.

Since 1997, enrollment in Detroit schools has dropped by 20,000 or 11 percent as students left for charter schools, private schools and nearby districts with schools-of-choice programs.

School reform board Chairman Frank Fountain said the yearly decline is not an indictment of the reform efforts, but an indication that the new administration hasn't convinced some Detroiters that they are positive changes in the schools.

"When we know we are turning the district around is when we begin to stop the loss of students and reverse that decline," he said.

The loss comes despite spending $1.5 million last year on public relations pitches to promote the schools. The money paid for billboards, radio ads, community newsletters and school registration fairs.

A campaign specifically designed to increase fall enrollment cost more than $410,000.

The district also put enormous efforts into getting students to school on September's "count day," the day when enrollment is counted to determine state aid. They gave free ice cream at lunch and sent flyers to parents saying that students could win prizes—computers, sports equipment and gift certificates—for attending school that day. The school district also opened eight new schools in the past two years and started new academic programs they hope will convince parents that the schools are getting better. Elementary students have new books and a completely new reading program, a $20 million investment to have every child reading by the third grade. There are also hundreds of all-day

prekindergarten and kindergarten classrooms designed to get students in the school system at an early age.

"We are fighting for our market share and to do that, we need to demonstrate to parents that we can educate their children equal to any other school district," said LaVonne Sheffield, the district's chief academic officer.

INCREASED COMPETITION

The school district is clearly struggling with competition from other schools. The 2000 census found 246,000 Detroit residents between 5 and 19 years old, evidence that many are either not in school or are attending schools elsewhere. Data on which schools Detroit children are attending this fall has not yet been released.

Detroit schools also must grapple with declining birth rates in Detroit and an exodus of residents. Detroit birth totals fell from 17,417 in 1995 to 15,892 in 2000, but the rate was relatively constant in the last part of the 1990s.

"Year to year, the number of the drop isn't so dramatic that they can attribute it necessarily to births," said Kurt Metzger, research director for the Center for Urban Studies at Wayne State University.

Compared to last school year, the school district attracted about 500 more kindergartners and increased the number of high school students at every grade level except for 10th grade, which bodes poorly on the district's efforts to keep students in school. Students who drop out of school often do it between ninth and 10th grades.

But the number of students in first through fifth grades declined at each level, according to district enrollment records.

The total loss is slightly less than in the late 1990s, when the district was losing about 4,000 students a year. It is also

less than some of the demographic projections, which estimated a possible loss of 7,000 students during the past two years.

"I was hoping to wipe it out," Burnley said. "That's tough." Burnley wanted to increase enrollment because every student brings money from the state. The district will get $7,179 per student in state aid this year, which includes a $15 million bonus to help with reform efforts.

School officials had been optimistic that they would either keep enrollment the same—or even increase the number of students—after several Catholic and charter schools closed in the city.

CLASSES FACE CUTBACKS

The decline will directly affect students like those at Fleming Elementary, where five teachers are expected to be transferred because of enrollment declines. The remaining classes will be combined and the number of students in each class will near 30.

After-school tutoring already has been dropped, along with the basketball and cheerleading squads and the math and chess clubs even though the school got the state's Golden Apple award last month for most improved test scores.

Fleming second-grade teacher Sherry Northrup said the student decline "reflects badly on Detroit Public Schools in general that people want to get their kids out of the schools."

"We are failing our kids when you cut teachers and put 30 kids in a classroom," said Northrup, an 11-year Detroit schools veteran who will get an additional seven students after another second-grade teacher is cut. "When those classes are broken up, it will disrupt the flow in everyone's classrooms."

Steve Wilke, who has two children at Detroit Open, a K-8 school, also is worried about a threatened loss of at least two

teachers. He's concerned that the student decline will lead to a further exodus from the district.

"Declining population is a self-fulfilling prophecy. You lose teachers and then it is a spiral," Wilke said. "It is turmoil when you have a program that you are trying to develop with kids and the kids walk into class one day and the teacher isn't going to be there. It's tough. It's disruptive."

Fountain, the reform board chairman, said school staff should work to make the school system attractive to parents and their children. He was encouraged that the loss was smaller than in the years before the state-led takeover in 1999.

"It says simply that we have to continue our efforts to improve academics, to improve the overall infrastructure of the district and we also have to be aggressively recruiting students," he said. "We have been fighting a good fight and we will continue to do so."

APPENDIX D

School workers disrupt board
Detroit panel cancels meeting

February 21, 2002

By Jodi S. Cohen and Hawke Fracassa / *The Detroit News*

DETROIT—Detroit school reform board members cancelled their meeting Wednesday night after deciding they couldn't do business over the noise of hundreds of angry protesters, who were intent on shutting the meeting down.

Board chairman Frank Fountain stopped the meeting before the public comment session and after completing a 10-minute agenda that included only a roll call, approval of minutes, and a brief comment about a Medicaid settlement.

"We reached a point where the noise was such that we couldn't conduct business," said Fountain, who first took a 45-minute break in the hope that would quiet the crowd of about 1,000 people, some of whom booed the board and sang "We Shall Overcome." About half the crowd wanted to disrupt the meeting, while others hoped to address the board.

It was the third time a meeting of the reform board has been cancelled since it was appointed in 1999, but the first since Kenneth Burnley took over as chief executive 19 months ago. Audience members have been arrested or removed from meetings in the past.

"We won," said the Rev. Thomas Jackson, an activist tradesman with Detroit schools who was part of the group heckling the board. "Give us a chance to participate and they won't have this."

Others in the audience had a different view, including some of the 50 people who filled out cards indicating they wanted to speak during the public comment period.

Eileen Gallagher, a laid-off school social worker, protested outside before the meeting but was angry at the group that protested in the auditorium. She had planned to tell the board about the importance of social workers, but instead she worries that "all the board is going to think about is the radicals and not what the people are trying to say."

The crowd, split between school workers who wanted to discuss the recent layoffs of about 700 employees and a more activist group angry about the removal of the elected board three years ago, first protested outside King High School before the meeting began.

Each Detroit school union had urged members to join the demonstration against the job cuts and the privatization of some district services.

"We want ... to sit down with Dr. Burnley and see what we can work out to maintain integrity and save jobs and keep pay intact," said Keith Johnson of the Detroit Federation of Teachers.

Tom Watkins, state superintendent of schools and a member of the reform board, said he agreed there should be a meeting with unions. "If they have ideas, let's sit down and listen," he said. "We should all be in it ... to do what's right for the children."

School officials say the cuts are needed to avoid a $70-million budget deficit this school year and a projected shortfall of nearly $100 million in the 2002-2003 academic year.

Walter Collier, 43, bounced his daughter Ashleigh, 2, on his shoulders during the demonstration. He was laid off Jan. 11 after 10 years as a union carpenter. "It's been pretty tough because I have five children to support," said Collier of Detroit.

The crowd also included Detroit school social worker Angela Gardner, who had planned to spend her career helping students cope with challenges including drug use, peer pressure and family problems.

"Everybody recognizes the psycho-social emotional ills our children face," said Gardner, one of about 50 social workers to be laid off. "Without school social workers, our children will not be able to achieve academically."

No. 02-711

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IN THE

Supreme Court of the United States

HELEN MOORE, *et al.*,

Petitioners,

v.

SCHOOL REFORM BOARD OF THE CITY OF DETROIT, DAVID ADAMANY, Chief Executive Officer of the Detroit Public Schools, DENNIS ARCHER, Mayor of The City of Detroit, and JOHN ENGLER, Governor of the State of Michigan,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SCHOOL REFORM BOARD OF THE CITY OF DETROIT, DAVID ADAMANY, CHIEF EXECUTIVE OFFICER OF THE DETROIT PUBLIC SCHOOLS, AND DENNIS ARCHER, MAYOR OF THE CITY OF DETROIT

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QUESTION PRESENTED

Does § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, apply to Michigan's School Reform Legislation, Public Act 10 of 1999, which provides that in school districts of 100,000 or more students school board members shall be appointed by the mayor of the city within which the school district is located rather than elected?

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STATEMENT OF THE CASE

Detroit Public Schools ("DPS") has been an educational system in distress for decades. Attempting to address the troubling state of affairs at DPS, the Michigan Legislature mandated school reform through the enactment of 1999 Public Act 10 ("PA 10"). Public Act 10 suspended the old elected Detroit Public School Board ("Old Board") and created a new seven-member Detroit Public School Reform Board ("Reform Board"), six of whom are appointed by the Mayor of the City of Detroit, Defendant Dennis Archer.

Displeased with the state's school reform legislation, Petitioners filed suit in the United States District Court for the Eastern District of Michigan. Petitioners alleged that PA 10 violated: (1) provisions of the Michigan Constitution; (2) the Fourteenth and Fifteenth Amendments; and (3) § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 ("VRA"). Petitioners include residents of the City of Detroit and various incorporated and unincorporated associations of Detroit residents. Respondents are the School Reform Board of the City of Detroit; David Adamany, then-Chief Executive Officer of the Detroit Public Schools; Dennis Archer, then-Mayor of the City of Detroit; and John Engler, then-Governor of the State of Michigan.

Following a period of discovery, Respondents filed motions for summary judgment, and Petitioners filed a motion for partial summary judgment. On October 25, 2000, United States District Judge Nancy Edmunds issued an Opinion and Order granting summary judgment in favor of Respondents and dismissing all of Petitioner's statutory and constitutional claims. (Memorandum Opinion and Order) (R. 84) (hereinafter "D Ct Op").

On June 12, 2002, the Sixth Circuit Court of Appeals issued a careful opinion affirming the District Court decision. (Sixth Circuit Opinion and Judgment) (hereinafter "6th Cir Op"). On August 9, 2002, the Sixth Circuit denied Petitioners' motion for rehearing *en banc*. In their petition before this Court, Petitioners ask only for a review of the lower courts' dismissal of their VRA claim. Specifically, Petitioners ask this Court to review the scope and coverage of § 2 of the VRA and hold that § 2 applies to a shift from an elective to an appointive process for school boards.

The Court of Appeals fully considered Petitioners' VRA claim. Petitioners argued that PA 10 violates § 2 because it denies Detroit voters, who are predominately African American, the right to elect their school board while allowing other Michigan citizens to continue to vote for their school board members. Petitioners urged the Court of Appeals to overrule its prior decision in *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999), in which the court held that § 2 does not apply to a shift from an elective to an appointive system for filling school board positions. Petitioners also argued that in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("Bossier Parish II"), this Court read § 2 of the Act more broadly than § 5. Petitioners asserted that because changes from elective to appointive systems are subject to § 5's preclearance requirement, § 2 applies to such changes as well. Petitioners argued, therefore, that *Mixon* is no longer valid.

Rejecting Petitioners' arguments and affirming the district court's determination that Petitioners failed to state a claim under § 2, the Court of Appeals correctly explained that the Supreme Court's decision in *Bossier Parish II* does not alter the reasoning employed in *Mixon*. The Court of Appeals distinguished *Bossier Parish II* on the basis that it

dealt only with § 5 and did not involve an appointive process. In reaffirming the *Mixon* analysis, the Court of Appeals followed the approach taken by all other federal courts addressing this issue in holding that § 2 applies only to elective offices, not appointive offices. In response to Petitioners' argument that §§ 2 and 5 are the same, the Court of Appeals noted that § 5 applies only in jurisdictions with a history of discriminatory voting practices, whereas § 2 applies in all jurisdictions to prohibit voting practices that have a discriminatory effect. The court also noted that Petitioners' challenge to an appointive system for filling school board positions must fail because citizens do not have a fundamental right to elect school board members.

For the reasons stated herein, this Court should uphold the lower courts' entry of judgment for Respondents and deny the petition for certiorari as lacking in merit.

COUNTER-STATEMENT OF FACTS

A. The State of The Detroit Public Schools Prior to Public Act 10: "Old" Detroit School Board Fails to Respond to Urgent Needs of Detroit Public Schools.

In 1997, New Detroit, Inc., a non-profit organization dedicated to improving the social and economic status of Detroiters, initiated a comprehensive study of the Detroit Public Schools with the goal of providing specific recommendations for improvement. A Review Panel reported its findings to the Detroit Board of Education in place at the time. After investing hundreds of hours studying DPS' operations, the Panel found "an immediate need for a fundamental restructuring of DPS' organization and for dramatic changes in the way people do their jobs at every level of the system." (Exhibit A in support of Def.'s motion for summary judgment, A Plan for Fundamental Change, at

10, Apx. at 235 (R. 66)). The resulting recommendations were unequivocal; change must begin immediately:

> To accomplish the changes contemplated by the Panel, the DPS must launch its restructuring without delay and continue the hard work consistently for years to come. Failure to take decisive action now will further erode the system's credibility and, eventually, cost it the community's faith and backing.

(Exhibit A in support of Defendants' motion for summary judgment, A Plan for Fundamental Change, at 3, Apx. at 228 (R. 66)).

Despite the fact that the Review Panel found serious problems in the governance, administration, management, finance, and operations of DPS and despite the fact that DPS students scored poorly on achievement tests and suffered from a high dropout rate compared to their peers statewide; the Old Board was slow to implement change. (D Ct Op, at 45a.) Although the Old Board appointed an Implementation Team to institute New Detroit, Inc.'s recommendations, the Review Panel expressed its view that "[t]he structure of DPS and the nature of the restructuring challenges, however, have significantly slowed the pace of action on many of the major objectives." (6th Cir Op, at 4a.)

B. PA 10 Imposes Sweeping Changes in the Governance of Detroit Public Schools.

Faced with continuing inaction after yet another study of DPS, a district charged with the duty of educating ten percent (10%) of Michigan's students, the Legislature acted to mandate reform. (D Ct Op, at 6.) On March 26, 1999, the Legislature through 1999 Public Act 10 ("PA 10"), M.C.L. § 380.371 *et seq.*, amended the Michigan School Code to

establish school reform boards of qualifying school districts, which are defined as a school district with a pupil population of 100,000 or more. M.C.L. § 380. 402.[1] Under the Act, the Old Board for all practical purposes was dismissed[2] and replaced by a new Reform Board consisting of six appointees made by the Mayor of the City of Detroit, with the seventh member being the Superintendent of Public Instruction or his designee. M.C.L. §§ 380.372(1) & (2).

Further, the Legislature provided that the Reform Board would select a CEO, and upon the appointment of the CEO, "all provisions of this Act [the School Code] that would otherwise apply to the elected School Board of the qualifying school district shall apply to the Chief Executive Officer." M.C.L § 380.373(4). Once appointed, the CEO assumes the executive and rule-making powers of the District.[3]

The Legislature's stated purpose in enacting PA 10 — improving the educational opportunities of ten percent (10%) of Michigan's students — was summarized by bill sponsor Senator Dan De Grow:

> There are approximately 180,000 students in the Detroit Public Schools. To put it in perspective, the next largest school district is Grand Rapids,

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1. Respondents Adamany and the Reform Board acknowledge that Detroit presently is the only school district in Michigan which meets the definition of a "qualifying school district."

2. The statute provides that the Old Board "may" meet as an advisory board and provide input to the Reform Board. *See* M.C.L. § 380.373(1). The Old Board never exercised this option.

3. After five years, *i.e.*, in 2004, the question of whether to retain the Reform Board and the Chief Executive Officer shall be placed before voters of the first class school district. M.C.L. § 380.375.

> which has around 27,000 students . . . I hope that gives you the idea of the magnitude of what happens when children aren't provided the educational opportunity they deserve and how that has repercussions throughout the state, just because of the magnitude.
>
> It has been said by someone else that Detroit is not the worst school district in the state and I won't dispute that, but when you have a district with 180,000 students, and you look at the class of 1998 and see 71 percent missing in action, one has to wonder what happens. Where do those young people go? What is their future; what does this mean for the state of Michigan? . . .
>
> We've waited a long time in this state for improvement, we've heard a lot of new plans — new plans have been coming out of [Detroit] since I've been down here as a legislature [sic] since 1981. I think it is time for fundamental change — major change that will give these 180,000 thousand [sic] students the opportunity to achieve a quality education. They do not have it now and the repercussions to this state and to those students are severe, we've had enough talk and it is time to pass Senate Bill No. 297.

(D Ct Op, at 3-4 (R. 84)).

The Legislature confirmed its intent of making PA 10 open-ended through the enactment of Public Act 230 of 2000, to make clear that the reform legislation applied to any school district in the State of Michigan that qualified (in terms of pupil count) on the date of enactment and to any school district that may become qualified in the future.

In enacting PA 10, the Legislature acted within its constitutional mandate to encourage, maintain and support public education in Michigan. MICH. CONST. art. VIII, §§ 1, 2.

C. Dr. Adamany Is Selected As Chief Executive Officer and Submits The School Improvement Plan.

On May 12, 1999, the Reform Board selected Dr. David Adamany, the former President of Wayne State University and a well-known figure in the Detroit community, to tackle the enormous responsibilities of CEO. Pursuant to PA 10, within 90 days of his appointment, Dr. Adamany was obligated to develop and submit to a School District Accountability Board a School District Improvement Plan that included detailed academic, financial, capital, and operational goals and benchmarks for improvement, as well as a description of strategies to be used to accomplish these goals and benchmarks. M.C.L. § 380.373(7).

In July, 1999, Dr. Adamany presented the Preliminary School Improvement Plan ("PSIP") to the Reform Board and to the School District Accountability Board. (D Ct Op, at 6 (R. 84)). Dr. Adamany, through the School Improvement Plan, arrived at a number of conclusions, many similar to those reached by the New Detroit Review Panel two years earlier and which support the Legislature's actions:

1. Detroit is indeed a district in deep distress.
2. Detroit students are graduating at about two-thirds the rate of other Michigan students.
3. Grade 11 Detroit Public Schools students[4] are 27.1%

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4. Petitioners attempt to make much of the alleged point that DPS students are outperforming students from many other districts. Their attempt is misleading because: (1) Petitioners typically cite (Cont'd)

behind the statewide average in reading; 27.2% in writing; 41.2% in math, and 38.5% in science.[5]

4. *None* of Detroit's fiscal or administrative operations meets acceptable standards.

5. Detroit Public Schools facilities are badly deteriorated and in most cases significantly outdated.

The Plan emphasized the significance of the problems faced by DPS:

> The distress of the Detroit Public Schools is no small matter. Its greatest impact falls on the 180,000 young people who study in the district. But it also affects the future of the City: if Detroit is to prosper, it must have an educated work force; if it is to have vibrant self-government, it must have an educated citizenry. The distress of the Detroit Public Schools spreads well beyond the

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(Cont'd)
fourth grade statistics. A key problem with DPS is that the longer students remain in the system, the worse they do in comparison to state-wide peers; (2) As stated by Representative Buzz Thomas, the alleged defense of DPS serves to underscore the magnitude of the problem:

> We have reacted in a zealously defensive manner, citing facts and figures showing that the Detroit schools, while not perfect, are not the absolute worst. How far have we fallen when our schools are in such a state that anything apart from total ineptitude serves as a measure of acceptable performance?

(Exhibit F in support of Defendants' motion for summary judgment, 3/2/99 Memo from Rep. Thomas, Apx. at 407 (R. 66)).

5. These findings are hardly unique. (Exhibit G in support of Defendants' motion for summary judgment, Apx. at 412 (R. 66)).

> district's borders because of Detroit's size and centrality. Forty-eight percent of Wayne County's students, future workers, and future citizens are enrolled in the district; twenty-five percent of the tri-county metropolitan area's and ten percent of the state's students are here. As every metropolitan region in America is discovering, its future is tied inextricably to its central city. The future of central cities rests foremost on their school systems. So it is in Detroit.

(D Ct Op, at 5-7 (R. 84)). Not even Petitioners dispute Dr. Adamany's findings. *See* Petition For A Writ Of Certiorari, at 9 n.7.

In June 2000, Dr. Adamany revisited each area of concern listed in his Report to the School Reform Board. (Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, Apx. at 524 (R. 66); D Ct Op, at 7 (R. 84)). In addition, he highlighted the Old Board's failure to utilize $1.5 billion in bonds, approved by the Detroit voters in 1994 for physical improvements to Detroit's schools.[6] (D Ct Op, at 7 (R. 84)). Under PA 10, the District, through the CEO and the Reform Board, must report to the Mayor, Governor and Accountability Board in regard to the School Improvement Plan and the progress being made in achieving Plan goals. Further, the Accountability Board can make recommendations as to additional resources and changes in statute or rules necessary to achieve the stated goals. M.C.L. §§ 380.373, 380.376. Thus, the Legislature ensured that there

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6. Indeed, Dr. Adamany concluded that the Old Board's use of its bonding authority "reveals a record of poor planning, incompetence, and waste." (Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, at 22-26, Apx. at 545-49 (R. 66)).

would be oversight of the reform process and, through the Accountability Board, that it would remain informed about the reform process and any proposed changes to the reform process. *Id.*

D. Detroit and Michigan Witness Changes in DPS in the Reform Board's First Year.

In the thirteen months Dr. Adamany served as CEO, Detroit's students, teachers, parents and the remainder of the community witnessed many changes. Dr. Adamany and the Reform Board aggressively recruited and hired over 700 new teachers, implemented a program to reduce class size in grades 1 through 3, spent an unprecedented $79 million in the summer of 1999 to repair school buildings, implemented a promotion policy requiring students to achieve a grade of "C" or better in reading and mathematics and attend summer school, developed a seven-year plan for utilizing bond proceeds to renovate 50 buildings and construct 69 new schools, developed a plan to reduce certain administrative budgets in order to channel more funds to schools in an effort to implement site-based management of schools (including the removal of principals and assistant principals from collective bargaining agreements), and outsourced the information technology department. (D Ct Op, at 7-8 (R. 84); Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, Apx. at. 524 (R. 66)).

In May 2000, the Reform Board hired a permanent CEO, Dr. Kenneth Burnley, to continue the changes begun in its first year. At all times, every member of the Reform Board appointed by the Mayor of Detroit has been African American, with the exception of one Hispanic appointee. Dr. Burnley is African American. Only one member of the seven-member Reform Board, the representative from the State of Michigan Department of Education, is Caucasian.

SUMMARY OF REASONS FOR DENYING THE WRIT

This case involves a revision to Michigan's school code designed to help the state's largest school district reverse deep-seated fiscal and administrative disarray, declining test scores and excessively high dropout rates. The Michigan Legislature, similar to state legislatures throughout the country, designed and enacted 1999 PA 10 for the purpose of addressing the unique problems faced by the Detroit Public School District, Michigan's largest school district. Statutes placing control of school districts in the hands of city mayors, similar to PA 10, have withstood constitutional challenge. *See Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999) (Cleveland); *Bricklayers Union Local 21 v. Edgar*, 922 F. Supp. 100 (N.D. Ill. 1996) (Chicago); *Welch v. Bd. of Ed. of Baltimore County*, 477 F. Supp. 959 (D. Md. 1979) (Baltimore); *Cohen v. New York*, 52 Misc. 2d 324, 275 N.Y.S.2d 719 (1966) (New York City).

Under PA 10, the Detroit Public Schools is now managed by a chief executive officer, who was selected by a reform board of education appointed by the Mayor of the City of Detroit, the highest elected official in the City. With the exception of one representative from the State of Michigan Board of Education appointed to the new reform board by operation of the school code amendments, the District's CEO, the members of the reform Board of Education, and the Mayor of the City of Detroit are all African-American citizens.

Petitioners claim that the statutory change from an elected board of education to a board appointed by the Mayor of the City of Detroit *ipso facto* triggers a violation of § 2 of the Voting Rights Act. Petitioners simply assert that even though no court has ever applied § 2 to an appointive system, § 2 should apply to the shift or change from an elective to an

appointive system because such a change would be captured by § 5 of the Act. Petitioners identify absolutely no authority for the proposition that § 2 can be invoked in a jurisdiction not covered by § 5 to prohibit a change from an elected to an appointed school board.[7] Moreover, Petitioners fail to establish that they have any constitutional or statutory right to an elected rather than an appointed board of education and an appointed CEO.

This is not a preclearance case brought under § 5, the only cases cited by Petitioners and *Amici* in support of the petition. Nor is this a vote dilution case under § 2 of the Voting Rights Act for the simple reason that the offices challenged by Petitioners are appointive, not elective, and Petitioners make no claim that their ability to elect the Mayor of the City of Detroit has in any way been impaired. This Court has never applied § 2 of the VRA to invalidate a state government's inherently political decision of establishing appointive boards of education in lieu of elected ones. The criterion for determining whether the mayor of a city in Michigan appoints the board of education, which in turn appoints a CEO to operate the school district, is strictly the size of the student population served (more than 100,000). While the Detroit Public Schools is the only school district in the State of Michigan at the present time which qualifies for an appointive board of education, the school reform legislation is open ended and is neither race conscious nor invidious. In holding that § 2 of the Voting Rights Act does not apply to the appointive system created by the new legislation, both the District Court and the Sixth Circuit were

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7. Section 5 of the VRA applies only to states with a record of voting discrimination. *See Allen v. Bd. Of Elections*, 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Section 5 does not apply to Michigan. 28 C.F.R. § 51.4.

faithful to this Court's prior decisions applying § 2 of the VRA and construing its scope. A voting practice or procedure which requires preclearance under § 5 of the VRA is not necessarily subject to challenge under § 2. The Petition does not meet the standards justifying review on certiorari. Sup. Ct. R. 10. The Petition should be denied.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT PROHIBIT A CHANGE FROM ELECTIVE TO APPOINTIVE POSITIONS FOR LOCAL SCHOOL BOARDS.

A. The Sixth Circuit's Holding Below And its Prior Decision In *Mixon v. Ohio* Correctly Interpret the Scope of § 2 of the Voting Rights Act.

In *Mixon v. Ohio*, a case factually similar to the present case, the Sixth Circuit held that § 2 of the VRA applies only to **elective, *not* appointive**, processes of selecting state or local officials. *Mixon*, 193 F.3d at 407. In *Mixon*, the Ohio Legislature enacted a statute allowing the Mayor of Cleveland to appoint a new school board. Because the Court of Appeals in *Mixon* found that § 2 of the VRA did not apply to appointive processes, it held that the VRA did not apply to the appointed school board. In both *Mixon* and the decision below, the Sixth Circuit relied upon the Supreme Court's observation that a state could avoid application of the VRA by changing from an elective to an appointive system. *Chisom v. Roemer*, 501 U.S. 380, 401, 404, 111 S. Ct. 2354, 2367, 115 L. Ed. 2d 348 (1991) (discussing state judicial elections); *see also Sailors v. Board of Ed. Of the County of Kent*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d (1967) (holding that voters did not have a right to elect members of the county board of education, who were chosen by delegates from local

school boards and finding that there was no constitutional prohibition on using an appointive system to select officials of nonlegislative character). (6th Cir. Op., at 19, 23.)

In its decision below, the Sixth Circuit also specifically rejected Petitioners' claims that because § 5 applies to changes from elective to appointive systems and because §§ 2 and 5 contain similar language, § 2 *ipso facto* also covers such transitions. (6th Cir. Op., at 24). As discussed *infra*, §§ 2 and 5 are not identical and serve different purposes. For this reason and as noted by the *Mixon* court, every other federal court that has addressed the issue of appointive processes has determined that § 2 applies only to elective processes. *See Mixon*, 193 F.3d at 407 (citations omitted).

B. Section 2 Of The Voting Rights Act Differs From § 5 In Its Purpose, Text, And Application Such That A State's Decision To Replace An Elective Process With An Appointive Process May Be Covered Under § 5 But Not Covered Under § 2.

Petitioners' argument in chief is that the Sixth Circuit's holding that § 2 does not apply to a shift from an elective to an appointive system is incorrect because the coverage and substantive standards of § 2 and § 5 of the VRA are identical. Petitioners contend that because § 5 applies to a change from an elective to an appointive process in jurisdictions that must comply with § 5, § 2 also covers such a change in all jurisdictions where the change impacts minorities. Petitioners' argument is a *non sequitur*. It must fail given the purpose, text, and application of §§ 2 and 5 and prior Supreme Court decisions.

Congress enacted the VRA in an effort to ensure that discriminatory state laws would not interfere with citizens' equal enjoyment of the right to vote. *See South Carolina v.*

Katzenbach, 383 U.S. 301, 308-15, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). In enacting § 2 and its later amendments, Congress sought to eradicate voting practices that minimize the voting strength of minority groups. *See Reno v. Bossier Parish School District*, 520 U.S. 471, 479, 117 S. Ct. 1491 (1997) (citations omitted) ("Bossier Parish I"). In enacting § 5, Congress took extra steps with regard to particular jurisdictions with a history of discriminatory voting practices. *See* 42 U.S.C. § 1973(b). In these § 5 jurisdictions, the Attorney General or the federal courts must approve any proposed change to a voting practice. 42 U.S.C. § 1973c.

Congress recognized § 5 as an extraordinary encroachment on the sovereign powers of the states to promulgate laws in general and voting legislation in particular. *See Katzenbach*, 383 U.S. at 334 86 S. Ct. 803. Such intrusions into the sovereign powers of states lacking such a pernicious history are unwarranted. Against this backdrop, to construe §§ 2 and 5 as identical would be contrary to Congress' intent in enacting the statute.

There are clear differences apparent in the text of § 2 and § 5. Section 2 prohibits states and political subdivisions from maintaining voting "standards, practices, or procedures" with respect to the nomination or election of representatives that hinder a citizen's right to vote based on race. Section 2 provides in pertinent part:

> (a) [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

> (b) a violation of subsection (a) of this section is established if .it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to elect representatives of their choice. . . .

42 U.S.C. § 1973.

On the other hand, Section 5 establishes a preclearance procedure for certain states with a history of discriminatory voting practices who desire to implement any change to a voting standard, practice, or procedure post 1964. Section 5 provides in pertinent part:

> [w]henever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . different from that [previously] in force or effect so as to ensure that it does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . .

42 U.S.C. § 1973c.

Upon examining the plain language of both sections, it is clear that § 2's coverage of procedures related to the *nomination* and *election* of representatives and § 5's coverage of *any* change — not just those affecting elections and nominations — is an important difference between the two sections. Moreover, § 2 covers all states where voting discrimination may occur and § 5 applies to only certain states with a history of discriminatory voting practices. Another

critical difference, obvious from the text, is that § 5 instructs that covered jurisdictions obtain preclearance of voting changes whereas there is no such requirement in § 2 and those jurisdictions not covered by § 5. Finally, and most obviously, if Congress had intended § 2 to be the same as § 5, there would have been no need to promulgate two separate sections. Thus, Petitioners' contention that §§ 2 and 5 are the same despite these important differences in the text is ill founded.

Contrary to Petitioners' insistence, this Court has already rejected the claim that the fact that a change in a voting practice must be precleared under § 5 necessarily means that the voting practice is subject to a dilution suit under § 2. *See Holder*, 512 U.S. at 882-83, 114 S. Ct. 2581. In *Holder*, this Court held that adherence to a single-commissioner form of county government and the failure to adopt a multimember commission, even though authorized by a Georgia statute, was beyond the scope of § 2 of the VRA. In a plurality opinion, this Court stated:

> It is true that in *Chisom v. Roemer* . . . we said that the coverage of §§ 2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). We did not adopt a conclusive rule to that effect, however, and we do not think that the fact that a change in a voting practice must be precleared under § 5 necessarily means that the voting practice is subject to challenge in a dilution suit under § 2.

Id.

Justices Kennedy and Rehnquist went further to note that if the structure and purpose of §§ 2 and 5 were identical then the case for interpreting the two sections to have the same

application in all cases would be convincing. *Id.* at 883, 114 S. Ct. 2581 (plurality opinion). The Justices noted, however, that "the two sections differ in structure, purpose, and application." *Id.* Furthermore, in providing examples of cases where voting practices would not be subject to § 2 even though the practices could be subject to § 5, the Court expressed doubt as to whether Congress contemplated that a racial group could bring a § 2 dilution challenge to an appointive office even though the same challenge could be brought under § 5. *Id.* at 884, 114 S. Ct. 2581 (discussing specifically *McCain v. Lybrand*, 465 U.S. 236, 104 S. Ct. 1037, 79 L. Ed. 2d 271 (1984), where the Court held that a change from an appointive to an elective office is covered under § 5). Interestingly, in spite of this strong language to the contrary, Petitioners cite *Holder* in support of their argument that §§ 2 and 5 are identical.

Moreover, in *Bossier Parish I*, the Court considered a Louisiana parish school board's request for § 5 preclearance for its proposed redistricting plan. The Court held that a proposed voting change could not be denied solely on the basis that a covered jurisdiction's new "standard, practice, or procedure" possibly violated § 2. Noting that a claimant can succeed under § 2 based on a finding of discriminatory effect but not succeed under § 5 because of a lack of retrogression, the Court stated, "[this Court] has consistently understood these sections, to combat different evils and, accordingly, to impose very different duties upon the states." *Id.* at 477, 117 S. Ct. 1491 (citing *Holder*, 512 U.S. at 883 114 S. Ct. 2581; *cf. Morse v. Republican Party of Virginia*, 517 U.S. 186, 282, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (Thomas, J., dissenting) (voting practice that is outside the scope of the preclearance provision because it is implemented in a noncovered jurisdiction may nonetheless be challenged in a lawsuit under § 2; legislative history expressly states

that not every action that can be brought under § 2 falls within the scope of § 5).

Petitioners cite *Bossier Parish II*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000), for the proposition that § 5 is broader than § 2 and because § 5 applies to a shift from an elective to an appointive process, § 2 also applies to such a shift. In *Bossier Parish II*, this Court held that preclearance under § 5 does not amount to approval under § 2. *Bossier Parish II*, 528 U.S. at 333-34, 120 S. Ct. 866. Preclearance is only a determination that the change is no more dilutive than what it replaces and therefore the change in voting practice cannot be precluded but can be attacked through a § 2 action. *Id.* at 335, 120 S. Ct. 866. Citing *Bossier Parish I*, in *Bossier Parish II*, the Court again refused to "blur the distinction between § 2 and §5" and exacerbate the federalism costs that the preclearance requirement procedure already exacts. *Id.* at 366, 120 S. Ct. 866. Like *Holder*, *Bossier Parish II*, simply does not support Petitioners' claim that the 1999 revisions to Michigan's School Code trigger a § 2 violation.

Certainly there are some instances in which § 2 applies to procedures also covered by § 5 (e.g., *Chisom*, 501 U.S. 380); however, those are cases where the actual voting standard, practice, or procedure in a § 5 jurisdiction is also covered by § 2. For example, a complainant can wage a § 5 challenge to state judicial elections as well as a § 2 challenge because § 2 also applies to *elections*. *Chison*, 501 U.S. 380. This scenario is contrary to that presented in the present action because § 2 does not apply to appointive systems. *See* cases cited in Section II.C, *supra*. Thus, even in a § 5 jurisdiction, once a change to an appointment process has been approved, a challenge to the appointment process can not be maintained under § 2.

These differences between § 2 and § 5 indicate that Congress did not intend the sections to be the same. Indeed, the fact that § 5 is limited to certain jurisdictions implies that Congress intended and allowed in other jurisdictions, like Michigan, flexibility to change from an elective to an appointive system without facing challenges under the Voting Rights Act. *See Mixon*, 193 F.3d at 408. This is particularly true where reform is addressed to a state's capacity to improve delivery of educational services to students most in need and where an ability to experiment is critical. *Id.* at 406.

Petitioners in effect urge this Court to incorporate § 5 into § 2. Congress did not intend this result in enacting these two distinct sections of the Voting Rights Act. With this in mind, it is unsurprising that this Court and other federal courts have declined to allow § 2 to be swallowed by § 5. The legislature had the opportunity to add into the VRA language indicating that every action subject to § 5 is subject to § 2. Congress declined to include such language. Should this Court do as Petitioners suggest and find that §§ 2 and 5 are identical, such a ruling would undermine the purpose for enacting two distinct sections of the VRA and essentially rewrite § 2 to extend to appointive processes and overhaul § 5 to cover all states.

C. Courts That Have Considered Voting Rights Act Claims Attempting To Apply § 2 To Appointive Systems Have Routinely And Consistently Denied Such An Application.

The Michigan legislature has chosen, as one of many efforts designed to strengthen and reform the educational system in Detroit, to install an appointive system for selecting school board members. Petitioners cite not a single case to refute the position that § 2 applies to neither appointive offices nor a shift from an elective process to an appointive

process. Petitioners cite none because no such cases exist. To the contrary, federal courts that have considered the question of § 2's applicability to appointive offices have unanimously concluded that § 2 applies to elective, not appointive offices. Quite notably, these cases span seven different federal circuits. *See Mixon*, 193 F.3d at 407-08 (appointive offices do not fall within the ambit of the § 2); *African-American Citizens for Change v. St. Louis Bd. of Police Comm'rs*, 24 F.3d 1052, 1054 (8th Cir. 1994) (challenge to a state statute granting the governor power to appoint four out of five Police Commissioners, court stated that "§ 2 of the Voting Rights does not apply to appointed officials."); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989) ("it appears more probable than not that § 2 is not applicable to appointive offices."); *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987) (holding that § 2 applies to a change in the number of *elected* at-large commissioners, court stated that "[t]he language [of § 2] is only and uncompromisingly premised on the fact of nomination or election."); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. 1981), *aff'd*, *Hightower v. Searcy*, 455 U.S. 984, 102 S. Ct. 1605, 71 L. Ed. 2d 844 (1982) (challenge to an appointive system for a local school board, court held that "this case involved an appointive rather than an elective scheme, and thus the district court was correct in holding that voting rights did not apply."); *Holley v. City of Roanoke, Alabama*, 162 F. Supp. 2d 1335 (E.D. Ala. 2001) (§ 2 did not apply to an appointive rather than an elective system for selecting members to the board of education); *African-American Legal Defense Fund, Inc. v. New York*, 8 F. Supp. 2d 330, 340 n.14 (S.D.N.Y. 1998) (challenge to an appointive system for members of the New York City's Board of Education and Community School Boards, court held that § 2 of the Voting Rights Act was inapplicable because this

was a purely appointive process); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1122-23 (E.D. Mo. 1997) (challenge to an appointive system for selecting judges that included a subsequent retention election system; court held that § 2 did not apply to the appointment of judges, but did apply to the subsequent retention elections); *Prewitt v. Moore*, 840 F. Supp. 436, 440 (N.D. Miss. 1993) (challenge to a purely appointive system of filling judicial vacancies and appointing temporary judges, court held that "§ 2 is inapplicable to appointive offices . . . [it] covers elected officials only."); *Bradley v. Indiana, State Election Bd.*, 797 F. Supp. 694, 698 (S.D. Ind. 1992) (§ 2 applies to retention elections for judges but not to the initial appointment of those judges); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1568 (N.D. Ill. 1988) (challenge to an appointive system where regular Circuit Court elected judges appointed Associate Circuit Court judges, court held that "[t]he Voting Rights Act covers elected officials only.").

A review of the courts' reasoning in a sampling of these cases illustrates the predominate view of the scope of § 2 with regard to appointive systems. These courts have begun their discussion with a review of § 2, calling particular attention to important language in § 2: "political processes leading to nomination or election" and "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Courts note that the plain language of § 2 compels the conclusion that § 2 does not apply to appointive offices. *See Mixon*, 193 F.3d at 407 (§ 2 refers to the election and nomination of representatives); *African-American Citizens for Change*, 24 F.3d at 1054 ("§ 2 is expressly limited to 'the political processes leading to nomination or election' of state and local officials."); *Dillard*, 831 F.2d at 251 (§ 2 premised on the fact of nomination or election); *Holley*, 162 F. Supp. 2d at 1341 (rights being protected by § 2 are the right to vote and the opportunity to elect).

Moreover, in looking to this Court for wisdom on the question of whether § 2 applies to appointive offices, lower courts have found guidance in *Chisom*, 501 U.S. at 404, 111 S. Ct. 2354.[8] In *Chisom*, this Court considered whether judicial elections were within the scope of § 2 of the VRA. Holding that such elections are within the scope of § 2, the Court stated in dicta that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by *changing* to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion." *Id.* at 401, 111 S. Ct. 2354 (emphasis added). By this statement, the Court implied not only that the VRA does not apply to appointive offices, but even more applicable to the matter presently before this Court, the Court suggested that a *change* from an elective to an appointive system for selecting judges would not trigger the VRA, at least so far as § 2 is concerned.

Petitioners do not challenge — indeed, Petitioners wholly ignore — the body of cases harmoniously holding that § 2 is inapplicable to appointive systems. Presumably then, Petitioners ask this Court to do the same or alternatively, to disregard the plain language of § 2, overrule all of the lower courts that have considered this issue, and abandon important dicta in *Chisom*.

Amici, on the other hand, acknowledge that § 2 does not apply to appointive systems; however, *Amici* submit that this is irrelevant. *Amici* argue that § 2 does not apply to systems that are *historically* appointive, but does apply to changes in voting systems where the new system has a racially disparate impact on minorities. (*Amici* Brief at 16.) *Amici*'s argument falls short in its attempt to dispel the importance of § 2's

8. All post *Chisom* cases mentioned in this section cite *Chisom* to support the conclusion that § 2 does not apply to appointive offices.

inapplicability to appointive offices and the body of cases addressing this issue. First, cases interpreting § 2 make no distinction between historically appointive systems and newly appointive systems. Second, the cases interpreting § 2 and indeed, § 2 by its language, addresses systems in their challenged form. Where a § 2 challenge is applicable, courts consider challenges to voting systems not by comparison to a system predating the change (as mandated by § 5), rather the voting system is examined in its present form to determine whether the system has an adverse impact on minorities. Importantly, only certain systems are subject to scrutiny under § 2. An appointive system, like the system the Michigan legislature has chosen, is not subject to § 2.

II. SECTION 2 OF THE VOTING RIGHTS ACT COVERS VOTING QUALIFICATIONS, PREREQUISITES TO VOTING, AND STANDARDS, PRACTICES, OR PROCEDURES WITH RESPECT TO VOTING AND DOES NOT EXTEND TO THE SIZE OR FORM OF A GOVERNING AUTHORITY.

In both the decision below and in *Mixon v. Ohio*, the Sixth Circuit Court of Appeals correctly determined that § 2 of the Voting Rights Act does not apply to appointive offices of a local Board of Education. Under the plain terms of the Act, § 2(a) covers only a defined category of state actions. Only "voting qualification[s]," "prerequisite[s] to voting," or "standard[s], practice[s], or procedure[s]" are subject to challenge under the Act. In his concurring opinion in *Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994), Justice Thomas made clear that the type of state law that may be challenged under § 2 is addressed explicitly in § 2(a), which defines and explicitly limits the type of voting practice that may be challenged under the Act. 512 U.S. at 924, 114 S. Ct. 2581. In regulating standards, practices and

procedures, § 2(a) reaches only "those states laws that [relate to] either voter qualifications or the manner in which elections are conducted." *Allen*, 393 U.S. at 591, 89 S. Ct. 817 (Harlan, J., concurring in part and dissenting in part).

Similarly, in order for a party to establish a violation of the VRA pursuant to § 2(b), it must be shown that members of a minority have less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice. 42 U.S.C. § 1973(b) (emphasis added). The Supreme Court has held that any challenged standard, practice or procedure must have *both* of these effects to violate the test outlined in § 2(b). *See Chisom*, 501 U.S. at 397, 111 S. Ct. 2354.

Probably for this reason, this Court has never utilized § 2 of the Act to impose upon a state or political subdivision a certain form of government; and for this reason as well, Petitioners cite no case for the proposition that § 2 of the VRA has been used to invalidate the creation of appointive offices for a school board.

The form of local school district governance is inherently a question for the State of Michigan to determine. Petitioners and *Amici* suggest that, in spite of its duty to the educate Michigan's children, the Legislature cannot act unless and until the educational programming and management of the Detroit Public Schools deteriorates to such a point that judicial intervention and monitoring becomes necessary. Such a restriction truly removes power from the citizens of Michigan and represents extreme intrusion upon state sovereignty.

Justice Thomas instructed:

> Reading the words in context strongly suggests that § 2(a) must be understood as referring to any

> standard, practice, or procedure with respect to voting. And thus understood, the terms of the section would not extend to the size of a governmental body; we would not usually describe the size or form of a governing authority as a "practice" or "procedure" concerning voting.

512 U.S. at 915, 114 S. Ct. 2581 (emphasis in the original).

Justice Thomas cautioned against an expansive reading of § 2:

> In my view, the tension between the terms of the Act and the construction we have placed on § 5 at the very least suggests that our interpretation of § 5 should not be adopted wholesale to supply the meaning of terms "standard, practice, or procedure" under § 2 of the Act.

Holder, 512 U.S. at 930, 114 S. Ct. 2581.

The Michigan Legislature changed the form of governance of school districts comprised of 100,000 or more students. Instead of governance by school board members who share equally in executive and rule-making responsibilities, the management of qualifying school districts is now vested in a CEO, selected by appointed school board members. Changes in the form of government are within the state's sovereign powers and beyond the scope of the VRA.

Accordingly, even though a change in the size of a county board or commission is a change in a "standard, practice, or procedure" for purposes of the pre-clearance procedure in § 5 of the Act, such a voting practice is not necessarily subject to prohibition under § 2 of the Act. *See Holder*, 512 U.S. at 884, 114 S. Ct. 2581. The same result should obtain for changes in the form of government.

III. PETITIONERS' CLAIM ALSO FAILS BECAUSE PA 10 DOES NOT AFFECT MINORITIES' FUNDAMENTAL RIGHT TO VOTE.

The United States Supreme Court and the Sixth Circuit have recognized that state legislatures need the freedom to develop strategies to improve education. *See Sailors*, 387 U.S. 105, 87 S. Ct. 1549; *Mixon*, 193 F.3d 389. Public Act 10 is an effort by the Michigan Legislature to do just that: develop a plan to improve the educational opportunities of students in Michigan's largest school district. Toward this end, this Court has already determined that Petitioners have no fundamental right to an elective board of education *vis-à-vis* an appointed one. Petitioners simply do not have a fundamental right to elect members of the Detroit School Board. *See Sailors*, 387 U.S. at 105 (6th Cir Op. at 19).

All that Petitioners have alleged — and all that they can prove — is that PA 10 applies to a school district that is predominantly African American.[9] However, Petitioners do not inform the Court that five members of the seven-member Reform School Board have been appointed by the Mayor of the City of Detroit are African American, and one member appointed by the mayor is Hispanic. PA 10 has therefore produced no discriminatory results in the composition of the Reform School Board or the race of the CEO. *See African-American Citizens for Change v. Robbins*, 825 F. Supp. 885 (E.D. Mo. 1993), *aff'd*, 24 F.3d 1052 (8th Cir. 1994) (district court dismissed plaintiffs' case because plaintiffs failed to allege that the appointive system for selecting Police Board members produced discriminatory results, particularly since 2 of the 4 appointed members of the board are African American). Moreover, appointed school board systems are

9. It should be noted that much of the alleged factual material referenced in the *Amici* brief is *dehors* the record.

permissible under the Constitution so long as the appointments are not made in a manner that systematically excludes an element of the population from consideration. *See Searcy*, 656 F.2d at 1009 (citing *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974).

In addition, what Petitioners would have this Court overlook is that PA 10 has no application to, and no impact whatsoever on, the numerous other districts in the State that are predominantly or even marginally African American.[10] Petitioners' claim must also fail because they have not and cannot point to any objective factors which demonstrate that minorities do not have equal access to the process of nominating and electing their representatives. *See Thornburg v. Gingles*, 478 U.S. 30, 73, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); *Ortiz v. City of Philadelphia Office of the City Comm'ners Voting Registration Div.*, 28 F.3d 306 (3d Cir. 1994). They cannot satisfy the dual criteria for finding a violation pursuant to § 2(b) of the Act.

In sum, the Michigan Legislature chose to replace its elective system for filling school board positions with an appointive system. Section 2 dictates and federal courts have unwaveringly held that appointive systems are not subject to § 2 of the VRA. Thus, Petitioners have failed to present an issue warranting this Court's review.

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10. These Michigan cities include Flint, Highland Park, Inkster, Pontiac, Southfield Jackson, Kalamazoo, Lansing, Grand Rapids and Romulus.

CONCLUSION

Wherefore, Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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